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Supreme Court

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 33

EDGAR SMITH, PETITIONER,

vs.

THE STATE OF TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

PETITION FOR CERTIORARI FILED MARCH 18, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

SUPREME COURT OF THE UNITED STATES

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 27, 1940.

—8183

[fol. 1] [Caption omitted]

IN CRIMINAL DISTRICT COURT NO. 2, HARRIS COUNTY, TEXAS

No. 45792

THE STATE OF TEXAS

vs.

EDGAR SMITH

Rape

PRESENTATION OF INDICTMENT

Wednesday, September 21, 1938.

This day the Grand Jury came into open Court in a body, a quorum thereof being present, and through their Foreman presented to the Judge of this Court the following bills of indictments, which were thereupon by the Court ordered filed and all necessary process to issue thereon, to-wit: No. 45972, The State of Texas vs. Edgar Smith.

[fol. 2] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

INDICTMENT—Filed September 21, 1938

In the Name and by Authority of the State of Texas:

The Grand Jury of Harris County, Texas, duly organized at the August Term, A. D. 1938, of Criminal District Court No. 2, of said county, in said court, at said term, do present that Edgar Smith, on or about the 1st day of August, A. D. 1938, in said county and state, did then and there ravish and obtain carnal knowledge of Linda Heiden, a woman, by force, threats and fraud, without her consent, the said Linda Heiden then and there not being the wife of the said Edgar Smith. Against the peace and dignity of the State.

DeWitt Krahl, Foreman of the Grand Jury.

[File endorsement omitted.]

[fol. 3] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

ARRAIGNMENT AND PLEA

This day Edgar Smith, the defendant, and his counsel being present in open Court and the District Attorney also being present in Court and it appearing to the Court that said defendant has been served with a copy of the indictment herein at least two entire days prior to the present day, and the Court proceeded to cause the said defendant, Edgar Smith, to be arraigned in due form of law; the name of said defendant, as stated in the indictment herein, was distinctly called, and thereupon the indictment was read to the defendant and he was asked whether he was guilty or not, as therein charged, and the said defendant answered in person that he was not guilty and his said plea of not guilty as charged in said indictment is here now entered of record upon the minutes of this Court.

[fol. 4] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

CHARGE OF THE COURT—Filed May 18, 1939

Gentlemen of the Jury:

The defendant, Edgar Smith, stands charged by indictment with the offense of rape of one Linda Heiden, a woman, alleged to have been committed in the County of Harris and State of Texas on or about the 1st day of August, A. D. 1938. To this charge the defendant has pleaded "Not Guilty".

Rape as it applies to this case, and as used in this charge, is the carnal knowledge of a woman, other than the wife of the person having such carnal knowledge, without her consent, obtained by force.

The proof must show, beyond a reasonable doubt, that the sexual organ of the female was penetrated by the male organ of the party accused. The depth of the penetration is immaterial, as the slightest penetration of the female organ by the male organ of the defendant is sufficient to constitute carnal knowledge.

The penalty prescribed by the statute for the offense of rape is death, or confinement in the penitentiary for life or for any term of years not less than five.

To constitute rape by force the accused must have ravished the alleged injured female by having carnal knowledge of her without her consent and against her will by force, and the force used must have been such as might reasonably be supposed to overcome resistance, taking into c-nsideration the relative strength of the parties and other circumstanccs of the case.

Therefore, you are instructed that if you believe from the evidence, beyond a reasonable doubt, that the defendant did, as charged in the indictment, on or about the 1st day [fols. 5-6] of August, A. D. 1938, in the County of Harris and State of Texas, make an ass*ua*lt in and upon the said Linda Heiden, a woman not then and there the wife of the defendant, and did then and there by force, as that term has been defined herein, ravish and have carnal knowledge of her, the said Linda Heiden, without her consent and against her will, then you will find the defendant guilty as charged, and assess his punishment at death, or by confinement in the penitentiary for life or for any term of years not less than five.

If you do not so believe, or if you have a reasonable doubt thereof, you will find the defendant not guilty.

If you believe from the evidence that Linda Heiden invited this defendant to engage in sexual intercourse with her on the 1st day of August, 1938, the date alleged in the indictment, and that he did so with her consent, or if you have a reasonable doubt as to whether such be the fact, then you will find the defendant not guilty.

The confession of a defendant may be used in evidence against him if it appears that the same was made freely and voluntarily, without compulsion or persuasion. The confession shall not be used against him if at the time it was made the defendant was in jail or other place of confinement, or in the custody of an officer, unless it was reduced to writing and signed by him, which written statement shall show that he was warned by the person to whom the same was made, first, that he does not have to make any statement at all; second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is made.

Now, if you believe from the evidence in this case that [fol. 7] the defendant, Edgar Smith, made a statement to Officer E. T. Dinkins which was reduced to writing, unless you further believe from the evidence beyond a reasonable doubt that the statement of said defendant was the identical statement which has been introduced in evidence by the State, and that the same was made only after the warning required by law had been given to him by Officer Dinkins, without promise on the part of the officer taking the statement of aid or mitigation of punishment, then you must not consider it for any purpose whatever against the defendant.

If you find the defendant guilty then you must not arrive at the punishment to be assessed by any lot or chance or by putting down any figures and doing any dividing.

In deliberating upon this case you must not refer to or discuss any matters not in evidence before you.

In all criminal cases the burden of proof is on the State.

The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt you will acquit him, and say by your verdict "not guilty".

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the court, which is herein given you, and be governed thereby.

Kenneth McCalla, Judge of the Criminal District Court No. 2 of Harris County, Texas.

[fol. 8] [File endorsement omitted.]

[fol. 9] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

No. 45972

THE STATE OF TEXAS

vs.

EDGAR SMITH

Indicted for Rape

JUDGMENT AND VERDICT—May 15, 1939

This Day this cause was called for trial, and the State appeared by her District Attorney, and the Defendant,

Edgar Smith appeared in person and by Counsel, and both parties announced ready for trial; and the Defendant Edgar Smith having been duly arraigned according to Law, in open Court pleaded not guilty to the charge contained in the Indictment herein; thereupon a jury, to-wit: Ed V. Johnson and eleven others, was duly selected, impaneled and sworn, according to law, who, having heard the indictment read, and the Defendant's plea of not guilty thereto, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer, the Defendant being present, and in due form of law returned into open Court the following verdict, May 18, 1939, which was received by the Court, and is here now entered upon the minutes of this Court, to-wit: "We, the jury, find the Defendant guilty as charged and assess his punishment at confinement in the State Penitentiary for Life. Ed V. Johnson, Foreman."

It is therefore considered and adjudged by the Court that the Defendant Edgar Smith is guilty of the offense of Rape as found by the jury, and that he be punished, as has been determined, by confinement in the State Penitentiary for Life, and that the State of Texas do have and recover of the Defendant Edgar Smith all costs in this prosecution expended, for which execution will issue, and that the said Defendant be remanded to jail to await the further order of this Court herein.

[fol. 10] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

DEFENDANT'S MOTION FOR NEW TRIAL—Filed May 18, 1939

To the Honorable Judge of said Court:

Comes Now the defendant, by and through his attorney, and requests the court to grant him a new trial in this cause, for the following reasons, to-wit:

That the verdict is contrary to the law and the evidence.

Sam W. Davis, Harry W. Freeman, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 11] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL

On this 1st day of June, A. D. 1939, came on to be heard the Motion of the defendant, Edgar Smith, for a New Trial in the above entitled and numbered cause; and appeared the parties, the State by her District Attorney and the defendant, Edgar Smith, in person and by counsel and the said Motion and evidence having been heard by the Court and the Court is of the opinion that the said motion should be overruled and refused.

It is therefore, considered, ordered and adjudged by the Court that the said Motion for a new trial be refused and overruled, to which order and judgement of the Court the defendant, Edgar Smith, excepted and gave notice of appeal in open Court from the ruling of this Court to the Court of Criminal Appeals of the State of Texas, at Austin, which notice of appeal is here now entered of record on the minutes of this Court.

It is further ordered that the defendant is allowed 90 days within which to file bills of exceptions and statement of facts.

[fol. 12] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

MOTION TO QUASH INDICTMENT—Filed February 20, 1939

To the Honorable Langston G. King, Judge of Said Court:

Comes now Edgar Smith, defendant in the above numbered and entitled cause, in person and through his attorneys of record, who have been appointed by this Court to represent him in this cause, and respectfully moves this Honorable Court to quash the indictment returned herein on or about September 21, 1938, and to dismiss said cause, for the following reasons, viz:

That your movant and petitioner, Edgar Smith, defendant herein, is a negro boy, eighteen years of age, who is

charged by indictment in this cause with having committed the offense of rape upon the person of Linda Heiden, a white woman, on or about August 1, 1938, in Harris County, Texas; that the Grand Jury Commissioners of Harris County, Texas, had intentionally, arbitrarily and systematically for a period of many years last past excluded all persons of African descent from serving on the Grand Jury, or, in any event, the number of negroes selected by the Grand Jury Commissioners for service on the Grand Jury for many years prior to the indictment of this defendant has been so negligible as in itself to show and establish such unlawful discrimination, and that no negro was selected by the Grand Jury Commissioners for service on the Grand Jury for the August, 1938, Term of this Court, during which Term said indictment was returned, notwithstanding the fact that more than twenty per cent of the population of said county are Negroes, and that such exclusion and discrimination were based solely on and because of their race [fol. 13] and color and not because such negro citizens lacked the qualifications prescribed for Grand Jurors by Article 339 of the Code of Criminal Procedure of The State of Texas, and that such arbitrary and systematic action of the Grand Jury Commissioners has resulted in denying to this defendant the equal protection of the laws, all of which is in violation of the Fourteen- Amendment to the Constitution of the United States of America, and in violation of Section 19 of Article 1 of the Constitution of the State of Texas, and in violation of Article 338 of the Code of Criminal Procedure of The State of Texas.

Wherefore, for the reasons above set forth, this defendant respectfully prays the Court to hear evidence upon and in support of this motion, that said indictment be quashed, that this cause be dismissed from the docket of this Court, and that this defendant be released from the custody of the sheriff of Harris County, Texas.

Harry W. Freeman, Sam W. Davis, Attorneys for Defendant.

Duly sworn to by Edgar Smith. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 14] IN CRIMINAL DISTRICT COURT NUMBER TWO, HARRIS COUNTY

[Title omitted]

STATE'S ANSWER TO DEFENDANT'S MOTION TO QUASH INDICTMENT—Filed February 20, 1939

To the Honorable Court above named:

Comes now the State of Texas, by and through its duly qualified and acting Assistant District Attorneys, Tom Bailey and Allie L. Peyton; and, in answer to defendant's motion to quash the indictment in the above entitled and numbered cause, respectfully presents:

1

That the grand jury commissioners of Harris County, Texas, have not intentionally, arbitrarily and systematically for a period of many years or for a period of any years excluded any person of African descent from serving on the grand jury.

2

That the honorable Court above named, as well as Judge Whit Boyd, Judge of Criminal District Court of Harris — have always charged the grand jury commissioners in conformity with statute and expressly cautioned them against any discrimination against any person because of race, color or creed.

3

That recently, and for many years past, there have been selected by such grand jury commissioners persons of African descent and members of the Negro race who have, as a matter of fact, actually served as grand jurors in this county.

That this defendant has not been denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, Section Nineteen, Article One, and Section Nineteen, Article One [fol. 15] of the Constitution of the State of Texas, and in violation of Article Three Hundred Thirty Eight, Code of Criminal Procedure of the State of Texas.

Wherefore, premises considered, the State prays this Honorable Court to hear evidence upon and incontrovention of the motion on file herein to quash said indictment above referred to, and that the Court overrule the said motion in all things.

Respectfully submitted, Tom Bailey, Allie L. Peyton, Attorneys for the State.

Duly sworn to by Tom Bailey and Allie L. Peyton. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 16] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

ORDER OVERRULING MOTION TO QUASH INDICTMENT

On this 20th day of February, 1939, appeared the parties, the State through its Criminal District Attorney, and the defendant, Edgar Smith, in person and by Counsel, and the State having announced ready for trial, the defendant presented to the Court his Motion to Quash the Indictment in the within cause.

The said Motion to Quash the Indictment having been presented to the Court and the State's Answer having been filed, evidence and argument having been heard by the Court; after consideration, the Court is of the opinion that said motion should be overruled; it is therefore ordered, adjudged and decreed that said motion be overruled, to which action of the Court, defendant takes exception.

[fol. 17] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

DEFENDANT'S MOTION FOR CONTINUANCE—Filed February 20, 1939

To the Honorable Judge of said Court:

Now comes, Edgar Smith, defendant in the above styled and numbered cause, and moves the court to continue said

cause to the next term of court, for the following reasons:

That your petitioner, defendant herein, is a negro boy 18 years of age, and he is charged with having committed the offense of rape upon Linda Heiden, a white woman, on August 1, 1938, in Harris County, Texas.

That he, through his counsel, on or about the 16th day of February, 1939, talked to Frank Marshall, a structural steel worker of 14 Travis Street, Houston, Texas, and shop foreman for B. A. Rievman Co. and ascertained from said Frank Marshall, that he had known the defendant, Edgar Smith, for a number of years; that the defendant worked for the prospective witness, and lived upon the premises of said witness; who on many occasions left the defendant with a young lady named Katherine Brett, a white girl, whom said Frank Marshall had taken to hi*m* home at Louetta, Harris County, Texas, and that on numerous occasions the defendant would be alone with Katherine Brett in the house, and that he knows the defendant's general reputation as a peaceful law-abiding citizen, and that such general reputation is good. That defendant also ascertained at that time that he could make similar proof by the said white girl, Katherine Brett, and accordingly defendant caused a subpoena to issue at the known address of said witness Frank Marshall, and the said Katherine Brett, on the 16th day of February, 1939, both of which witnesses [fol. 18] being white persons, and the said Frank Marshall having given the defendant's counsel, Harry Freeman, positive assurance on the 16th day of February, 1938, that he would be present in Houston and available as a witness, when called, and that Katherine Brett, the lady above mentioned, who lives at his home, at Louetta, Texas, would likewise, if subpoen-ed, appear as a witness.

That the above named witnesses are the only white persons this defendant expects to use as character witnesses.

That in all probability the jury when selected will consist exclusively of white persons, there being only two negroes out of a special venire of 150, who are now present in court to be examined for jury service in this case.

That this is defendant's first application for a continuance, and is not sought to hinder, delay, or obstruct justice, but that Justice be done.

That the witnesses are not absent by the procurement or consent of the defendant; that the application is not made

for delay. That there is no reasonable expectation that attendance of the witnesses can be secured during the present term of court by a postponement of the trial to some future date of said term.

And in the alternative the defendant prays the court that said cause be postponed to a subsequent date in this term in order that he may obtain the testimony of said absent witnesses.

The subpoena for said witnesses and the sheriff's return are hereto attached and made a part of this application for continuance.

Edgar Smith.

[fol. 19] Subscribed and sworn to, before me, this 20th day of February, A. D. 1939.

J. W. Mills, Clerk of Criminal District Court #2, Harris County, Texas. By R. J. Lindley, Deputy. (Seal.)

Motion for Continuance is granted.

Langston G. King, Judge.

EXHIBIT TO MOTION

IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

To the Sheriff or any Constable of Harris County, Greeting:

You are hereby commanded to summon Frank Marshall, Steel Worker foreman % B. A. Riesner Co., 14 Travis; Mrs. Mattie Attaway, 1522 N. Shepard; John Collins at "Wise Settlement", Louetta, Texas; Catherine Brett, % Frank Marshall, Louetta, Texas; Fred Bostick (negro) Rt. 2, Box 260, if to be found in your county, to be and appear before the Honorable Criminal District Court No. 2, in and for Harris County, on Feb. 20, 1939, at nine o'clock A. M. to give evidence in behalf of the State and the Defendant, in a certain cause wherein the State of Texas is Plaintiff, and

Edgar Smith is Defendant, and there to remain from day to day, and from term to term until discharged by the Court.

Herein fail not, and due return make of this writ.

Witness my official signature this 16 day of Feb. A. D. 1939.

J. W. Mills, Clerk Criminal District Court No. 2, Harris Co., Texas. By R. J. Lindley, Deputy. (Deft.)

[fol. 20] SHERIFF'S RETURN

Came to hand on the — day of ——, 193—, and executed by summoning the within named witness in person, in the County of Harris, at the dates as herein stated, viz:

Date of Service	Name	Total Fees
2-17-1939	Mrs. Mattie Attway	
2-17-1939	Fred Bostwick	$1.00

and not executed as to witness —— the diligence used in finding said witness Frank Marshall & Catherine Brett in San Antonio but I left slip for them John Collins in Sugar Town, La. and who after due search and diligent inquiry, cannot be found in Harris County, Texas.

Norfleet Hill, Sheriff of Harris County, Texas. By Roy Bernard, Deputy.

[File endorsement omitted.]

[fol. 21] IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

EXCEPTIONS TO COURT'S MAIN CHARGE, AND DEFENDANT'S SPECIAL CHARGES—Filed May 18, 1939

To the Honorable Kenneth McCalla, Judge of Said Court:

Comes now the defendant, Edgar Smith, before the court's main charge is read to the jury and within a reasonable time prior thereto, timely excepts to the court's main charge in so far as the court's definition of rape by threats or fraud is concerned because:

First, there is no evidence whatsoever of any threat or fraud in this case and defendant requests the court to charge

the jury in this case that there is no evidence of threats or fraud, and the State's case, if any, is limited to the allegation in the indictment of rape by force.

5/18/39. Charge amended to cure this objection.
Kenneth McCalla, Judge.

Second, that the court's charge and definition of what constitutes force is insufficient because the evidence raised the issue of consent and want of resistance on the part of the prosecutrix.

As applied to the facts of this case defendant requests the court to give the following definition of force:

Defendant's Special Charge No. 1

Gentlemen of the jury, I charge you as part of the law applicable to this case that ever exertion in the power of the woman under the circumstances must be made to prevent the penetration of her person, or consent will be presumed.

Defendant further requests the court to charge the jury [fol. 22] on the issue of force arising from want of resistance on the part of the female as applied to the facts of this case. 5/18/39. Refused. Kenneth McCalla.

Defendant's Special Charge No. 2

Mere intercourse, even is without consent, is not rape by force. There must be resistance upon the part of the alleged raped female, dependent upon the circumstances surrounding her at the time and the relative strength of her and the defendant and every exertion and means within her power must be made to prevent the penetration of the person of the woman; and, unless such means and exertion are used, the defendant should be acquitted, and if you so find or have a reasonable doubt as to the facts you will acquit the defendant.

Defendant further excepts to the court's main charge because it nowhere affirmatively presents his defense as raised by the evidence in this case that the prosecutrix, Linda Heiden, consented to the act of intercourse, and he respectfully requests the court to charge the jury as follows:

5/18/39. Refused. Kenneth McCalla, Judge.

Defendant's Special Charge No. 3

Gentlemen of the jury, if you believe from the evidence that Linda Heiden invited this defendant to engage in sexual intercourse with her on the first of August, 1938, the date alleged in the indictment, and that he did so with her consent, or if you have a reasonable doubt as to whether such be the fact, then you will find this defendant not guilty.

5/18/39. Given in main charge. Kenneth McCalla, Judge.

Defendant excepts further to the court's main charge because no instruction is given with reference to the purported confession of the defendant which has been intro- [fol. 23] duced in evidence by the State and in this connection he requests the court to charge as follows:

Defendant's Special Charge No. 4

Gentlemen of the jury, the confession of a defendant may be used in evidence against him if it appears that the same was freely made without compulsion or persuasion under the rules hereafter prescribed. The confession shall not be used if, at the time it was made, the defendant was in jail or other places of confinement, nor while he is in the custody of an officer, unless it be made in writing and signed by him; which written statement shall show that he has been warned by the person to whom the same is made; first, that he does not have to make any statement at all. Second, that any statement made may be used in evidence against him on his trial for the offense concerning which the confession is therein made.

5/18/39. Given in main charge as altered. Kenneth McCalla, Judge.

Now, if you believe from the evidence in this case that the defendant, Edgar Smith, made a statement to Officer E. T. Dinkins which was reduced to writing, unless you further believe from the evidence beyond a reasonable doubt that the statement of said defendant was the identical statement which has been introduced in evidence by the State and that same was made only after the warning required by law had been made and explained to him by Officer Dinkens and that defendant, taking into consideration his age, experience and all the surrounding circumstances, understood

the same and so understanding voluntarily gave such information and signed his name thereto, without promise on the part of the officer taking the statement of aid or mitigation of punishment, then you must not consider it for any purpose whatsoever against the defendant.

[fol. 24] Respectfully submitted, Sam W. Davis, Harry W. Freeman, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 25] In Criminal District Court No. 2 of Harris County

[Title omitted]

Pauper's Affidavit and Order Thereon—Filed June 7, 1939

Harry W. Freeman, having been duly sworn on oath says:

That he is one of the attorneys appointed by said Honorable Court to represent the defendant, Edgar Smith, and that the said defendant is too poor to pay the costs of court and is unable to give security therefor.

Wherefore, said defendant prays that the clerk of this Court be required to make up the transcript in this cause and the court reporter be required to make up the statement of facts herein.

Harry W. Freeman, Attorney for Defendant, Edgar Smith.

Subscribed and sworn to before me at Houston, Texas, this 2nd day of June, 1939. Elizabeth Cleveland, Notary Public, Harris County, Texas. (Seal.)

[Title omitted]

Order

On this June 7th, 1939, came on to be heard the affidavit filed herein in behalf of the defendant by Harry W. Freeman, one of the attorneys appointed by the court to repre-

sent said defendant, said affidavit setting up that the defendant is too poor to pay the costs of court and is unable to give security therefor, and the court being convinced that the facts therein set forth are true and that defendant is [fol. 26] entitled to the relief therein prayed for.

It is therefore ordered, adjudged and decreed by the court that the clerk of this court be and he is hereby required to make up the transcript in this cause without requiring payment of the costs therefor, and that the court reporter be and he is hereby required to make up the statement of facts in this cause without requiring any payment therefor.

Kenneth McCalla, Judge.

[File endorsement omitted.]

[fol. 27] In Criminal District Court No. 2 of Harris County

No. 45972

The State of Texas

vs.

Edgar Smith

Sentence and Judgment—June 1, 1939

This Day this cause being again called, the State appeared by her District Attorney, and the Defendant Edgar Smith was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law propounded in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term.

And thereupon the Defendant Edgar Smith was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, Edgar Smith to pronounce sentence against him as follows, to-wit: "It is the order of the Court that the Defendant, Edgar Smith who has been adjudged to be guilty of Rape whose punishment has been assessed by the verdict of the jury at confinement

in the State Penitentiary for Life, to be delivered by the Sheriff of Harris County, Texas, immediately to the Board of Prison Commissioners of the State of Texas, or other person legally authorized to receive such convicts, and said Edgar Smith shall be confined in said Penintentiaries for not less than five years nor more than Life.

And the said Edgar Smith is remanded to jail until said Sheriff can obey the directions of this sentence.

But inasmuch as said Defendant has given notice of appeal herein, the execution of this sentence is deferred to await the judgment and order of our Court of Criminal Appeals in this behalf.

[fol. 28] In Criminal District Court No. 2 of Harris County

[Title omitted]

Bill of Exceptions No. 1—Filed July 25, 1939

Be It Remembered that at the time the above numbered and entitled cause was called for trial on the 21st day of February, 1939, and after the State had announced ready for trial but before the defendant had announced ready, he timely presented his sworn motion to quash the indictment in this cause, which motion to quash was as follows:

To the Honorable Langston G. King, Judge of Said Court:

Comes now Edgar Smith, defendant in the above numbered and entitled cause, in person and through his attorneys of record, who have been appointed by this Court to represent him in this cause, and respectfully moves this Honorable Court to quash the indictment returned herein on or about September 21, 1938, and to dismiss said cause, for the following reasons, viz:

That your movant and petitioner, Edgar Smith, defendant herein, is a Negro boy, eighteen years of age, who is charged by indictment in this cause with having committed the offense of rape upon the person of Linda Heiden, a white woman, on or about August 1, 1938, in Harris County, Texas; that the Grand Jury Commissioners of Harris County, Texas, had arbitrarily and systematically for a period of many years last past excluded all persons of Afri-

can descent from serving on the Grand Jury, or, in any event, the number of Negroes selected by the Grand Jury Commissioners for service on the Grand Jury for many years prior to the indictment of this defendant has been so negligible as in itself to show and establish such unlawful discrimination, and that no Negro was selected by the [fol. 29] Grand Jury Commissioners for service on the Grand Jury for the August, 1938, Term of this Court, during which Term said indictment was returned, notwithstanding the fact that more than twenty per cent of the population of said county are Negores, and that such exclusion and discrimination was based solely on and because of their race and color and not because such Negro citizens lacked the qualifications prescribed for Grand Jurors by Article 339 of the Code of Criminal Procedure of The State of Texas, and that such arbitrary and systematic action of the Grand Jury Commissioners has resulted in denying to this defendant the equal protection of the laws, all of which is in violation of the Fourteenth Amendment to the Constitution of the United States of America, and in violation of Section 19 of Article 1 of the Constitution of the State of Texas, and in violation of Article 338 of the Code of Criminal Procedure of The State of Texas.

Wherefore, for the reasons above set forth, this defendant respectfully prays the Court to hear evidence upon and in support of this motion, that said indictment be quashed, that this cause be dismissed from the docket of this Court, and that this defendant be released from the custody of the sheriff of Harris County, Texas.

Whereupon the State filed answer through the District Attorney of Harris County, Texas, denying the allegations of defendant's said motion, and an issue being joined the following evidence was introduced ther-on before the Honorable Langston G. King, Judge of the Criminal District Court, No. 2, of Harris County, Texas, before whom said cause was then pending, which evidence has been transcribed by the official shorthand reporter of said Court and entitled "Statement of Facts on Hearing of Motion to Quash Indictment", is incorporated herein in its entirety [fol. 30] and made a part of this bill of exception for all purposes, containing all the evidence introduced by both the defendant, Edgar Smith, and the State of Texas upon the hearing of defendant's said motion.

That all the testimony and documentary evidence introduced at said hearing shows that the defendant is a Negro and that the alleged injured party upon whom he is charged by indictment with having committed the offense of rape is a white woman; that no Negro served upon the Grand Jury which indicted the defendant, nor was any Negro even drawn by the Grand Jury Commissioners at that term of court, nor was any Negro drawn as a member of the Grand Jury panel of sixteen from which the Grand Jurors were selected by the court; that no Negro served on any Grand Jury during the entire year of 1938; that more than twenty per cent of the population of Harris County, Texas, at all times material to this inquiry, were Negroes; that of eighty-five thousand poll taxes of both men and women paid, eight thousand were Negroes and of which eight thousand Negroes some four thousand to six thousand of them were men possessing the qualifications of Grand Jurors as enumerated in the Statute; that only the better class of the Negro population of said county are sufficiently interested to pay their poll taxes and those who pay their poll taxes at all represent the better type and law-abiding Negro population; that of those Negroes who were shown to have paid their poll taxes many of them are high school graduates and elementary, high school and college teachers, also members of various professions, and all possessing the qualifications of Grand Jurors; that only one Negro for the entire year of 1938 was merely placed upon the Grand Jury panel of sixty-four names during the said year, and he did not actually serve because "There were twelve qualified grand jurors on [fol. 31] the list before him, and his name not reached." (testimony of the District Clerk) That during the past ten years the record shows the names of only eighteen Negroes were drawn by the Grand Jury Commissioners out of a total list of six hundred and forty constituting the total Grand Jury panel for such period; that the last Negro to serve on a Grand Jury of Harris County was Alex Taylor, a member of the Grand Jury for the February term, 1936; that another Negro, Lewis Watson, served as a member of the May term, 1934; that a Negro, Homer E. McCoy, served on the May term, 1932; W. P. Cartwright served in November, 1931; that of the three Grand Jury Commissioners appointed by the court to select the Grand Jury no Negro has ever been appointed within the memory of the clerk of the

court nor of the Trial Judge, both of whom testified at the said hearing; that of the total of four hundred and eighty Grand Jurors who actually served during the past ten years only five were Negroes; that never more than one Negro was ever drawn by the Grand Jury Commissioners and this has occurred not more than twice in any year for the past ten years except the year 1935, and that almost invariably the Negro's name appears No. 16 upon the list, and that as a general rule the court in selecting the Grand Jury from the Grand Jury panel calls the first twelve on the list. The result speaks for itself.

That after the conclusion of all the testimony adduced upon the hearing of said moti-n, which was prior to the actual trial of this defendant, the court overruled the defendant's said motion, to which action of the court defendant then and there excepted and gave notice of appeal to the Court of Criminal Appeals at Austin.

Sam W. Davis, Harry W. Freeman, Attorneys for Defendant.

[fol. 32] ORDER

The foregoing bill of exception No. 1 having been reduced to writing by the attorney for defendant, Edgar Smith, and having been presented to the undersigned judge of said court before whom said motion was heard within the time required by law and having been duly considered and found to be correct, is hereby allowed, approved and ordered filed by the clerk of this court as a part of the record in such cause this July 25, 1939, with the following qualification and explanation.

The Court does not certify that the foregoing Bill of Exceptions No. 1, states all the testimony heard in support of and contravention of said Motion, but refers the Court attached Statement of Facts on the hearing on Motion to Quash Indictment herein, for full and complete statement of all testimony heard.

Langston G. King, Judge, Criminal District Court No. 2, Harris County, Texas.

IN CRIMINAL DISTRICT COURT NO. 2 OF HARRIS COUNTY

[Title omitted]

STATEMENT OF FACTS ON HEARING ON MOTION TO QUASH INDICTMENT—Filed July 25, 1939

Be It Remembered, that on hearing in the above entitled and numbered cause, had in said court, at said term, before the Hon. Langston G. King, judge presiding, the following were the facts and all the facts proved, to-wit:

Mr. Card G. Elliot, called as a witness on behalf of the Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

I was a member of the Grand July Commission which selected the Grand Jury for the August Term of 1938 of [fol. 33] Harris County, Texas. Mr. T. L. Culpepper and Mr. George W. Strake were the other two members of the commission. We were appointed by Judge Langston G. King.

We drew the grand jury for the August term of 1938.

I don't recall if we drew any negroes on that grand jury. I have just looked at a list of the grand jurors for the August term of 1938; I do not know all of those men personally.

At this time counsel for defendant offered and introduced the list of Grand Jurors for the August Term of 1938, which reads as follows:

OFFER IN EVIDENCE.

Copy of Grand Jury List.

I. 1. John A. Atkinson.
Ex. 2. H. R. Cullen.
II 3. Joe F. Overbey.
N/s 4. E. A. Fretz.
Ex. 5. J. W. Link, Jr.
III 6. J. R. Gahan.
Ex. 7. J. Virgil Scott.
Ex. 8. Simon Sakowitz.
IV. 9. Dewitt D. Krahl, "Foreman".

V. 10. Frank C. Clemens.
Ex. 11. C. A. Thanheiser.
VI. 12. K. L. Simons.
Ex. 13. R. L. Dickson.
VII. 14. W. T. Busch.
VIII. 15. T. L. Chandler.
Ex. 16. George Counts.
IX. 17. W. J. Wells.
X. 18. W. Cecil Sisson.
XI. 19. W. F. Puls.
XII. 20. E. R. Kilgore.
II. Carl B. Ehman picked up 9/6/38 to take place of Joe F. Overby.

[fol. 34] THE STATE OF TEXAS,
County of Harris:

I, J. W. Mills, Clerk of the Criminal District Court No. 2 in and for said County, do hereby certify that the foregoing list of Grand Jurors is a true and correct copy of the original list selected by the Grand Jury Commission of this County, to serve as the August Term, A. D. 1938 of said Court; said Jurors to be and appear at the Court House thereof in said County, in the City of Houston, on the first day of August, A. D. 1938, at 9:00 o'clock A. M. and then and there to serve as Grand Jurors for the August Term of said Court.

In testimony whereof, I hereunto set my hand and seal of the Criminal District Court No. 2 of said county, at office in City of Houston, This the 5th day of July, A. D. 1938.

J. W. Mills, Clerk of the Criminal District Court, Harris County, Texas. By R. J. Lindley, Deputy. (Seal.)

I have lived in Harris County, Texas, since 1917, continuously. I am in the railway supply business.

All of the Grand July Commissioners at the time I served were white men.

(It was agreed and admitted for the purpose of the Record

That the defendant, Edgar Smith, is a Negro of African descent, and that the Complaining witness, Mrs. Linda Heiden, upon whom it is charged the defendant committed rape, is a white woman.)

I am familiar with the growth of Houston and Harris County and the population generally of the county.

It was agreed that Houston was the leading city in the [fol. 35] State in point of population according to the 1930 census.

I do not know what percentage of the population of Harris County are negroes or were in August of 1938. I have no idea as to the percentage. I know, of course, that there are a large number of negroes in the county.

In selecting the Grand Jury I tried to select Grand Jurors who were representative of all the class of the county. I had that in mind.

It is my impression that we had before us the statute with reference to the qualifications of Grand Jurors, or the Court instructed us. We selected the Grand Jurors from our personal acquaintance with people over the county. We did not have before us a poll tax list or property tax list. We did not select the Grand Jurors from the telephone directory or city directory.

It was fully two weeks before I actually appeared in court to select the Grand Jurors that I was notified that I had been appointed a member of the Grand Jury Commission, but I don't recall exactly how long it was.

I did not have in mind anybody for grand jurors before I arrived at the court house. No intimation was given me from any source as to whom I should select for grand jurors. I knew that grand jurors should be citizens of the county and State I don't know if their eligibility was discussed. I assumed the man we selected were all poll tax payers, if that question occurred to me. I did not make any investigation to determine whether they were poll tax payers or not, or property tax payers. I don't recall any discussion that we had regarding whether the grand jury panel of sixteen were poll tax payers or property tax payers. I did not select any negro as a member of the grand jury panel. I don't know many negroes in the county, other than those who have worked for us. I presume there are quite a [fol. 36] number of negroes in Harris County now and at that time who were free holders or householders in the county, were of sound mind and good moral character, who were able to read and write, and had not been convicted of a felony or were under indictment, but I don't know how

many had paid their poll tax. I made no investigation to determine the number of negroes who had paid their poll tax.

As far as I know there were no negroes selected on that Grand Jury; I don't know all of the men on that Grand Jury.

It is my recollection that some negroes were discussed being selected on that grand jury panel, but I don't recall their names.

I don't know that any of them were listed on the Grand Jury panel. It so happened that the names I suggested were white men; it just happened that they were; they were men of my acquaintance.

There was some mention of having a negro or negroes on the Grand Jury panel, but I don't recall exactly what it was. I don't know if any negroes were selected or not; I know there were no negroes among the men that I suggested. I don't know if the other two commissioners suggested any negroes or not; I know there was some discussion about it, but I can't say positively just how extensive that discussion was. I know the names were being suggested by the three of us, but there were names of people mentioned that I didn't know. We were engaged in selecting the Grand Jury panel for several hours; I think it took up the best half a day. I do not remember the name of any particular negro possessing the qualifications of a grand juror.

It is my impression from reading papers over the past years, and just happening to notice the personnel of the Grand Juries, that there — usually at least one negro on the [fol. 37] Grand Jury; that's the impression I have had. I don't know how many negroes have been on the grand jury in the last ten years. I don't know if more than one has been on a Grand Jury, but I do recall negroes being on the Grand Jury and reading about it.

We had no list before us when we selected the Grand Jury; we didn't have a telephone directory or a city directory. We just sat down and selected sixteen good men who we figured were qualified without any regard to anything other than their qualifications. It was my thought to pick a representative Grand Jury, fair to all classes. I didn't suggest an- negro because I didn't happen to know any negro. I don't know at this time of a single negro in Harris County, possessing the qualifications of a Grand

Juror. I did not know of any such negro, if holding a poll tax receipt is a requisite. I did not make any effort to determine whether any negro possessed the qualifications according to the statute. I don't know if the other commissioners did; if they did, I don't know.

The question of negroes was mentioned, and it is my impression that the other gentlemen, I don't know which one, maybe both of them, mentioned the possibility of selecting a negro that would qualify. The only discussion was this: That the question of race was not to be considered; a man was not disqualified because he was a negro.

Cross-examination.

By Mr. Bailey:

I did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that Grand Jury.

Redirect examination.

By Mr. Davis:

I didn't suggest any negro; I didn't know of one. I do not know if there was a negro on that Grand Jury panel or not.

[fol. 38] AGREEMENT AS TO POPULATION

It was agreed that according to the United States Department of Commerce, Bureau of Census report, for the year 1930, the negro population of Harris County in 1930 was 72,603 including men, women and children.

R. R. GROBE, called as a witness on behalf of Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Freeman:

My name is R. R. Grobe. I am in the barber business. I have lived in Houston, Harris County, Texas, for twenty-two years. I have made investigation as to the number of

poll tax payers amongst the colored population of this county. My investigation is based upon the poll taxes collected at my place and in my neighborhood; I have written poll taxes for the past five years. We also have an organization known as the Third Ward Civic Club, and we have attempted to get an estimate on the number of polls that were paid by negroes. We couldn't count the exact number, but we could estimate it based on the number of collected by other negro deputies, who collect negro poll taxes exclusively. I also investigated from the poll tax records of the tax collector's office. We checked that poll tax list. They put a "C" behind the negro names. We counted those marked "C", but only in our neighborhood. In our neighborhood we had 1,700. The other neighborhoods averaged 500 or more. According to the best estimate the total number of negro poll tax payers was between 7,000 and 8,000. That was for the year before last, the 1936 poll. We also made the same count for 1937, and it was about the same; it will vary in election years. We haven't checked the 1938 figures yet. We make that count every year; the last one was for 1937.

I am acquainted extensively with the colored population of this city and county. I am chairman of the educational committe- of the Third Ward Civic Club. From my knowl- [fol. 39] edge of the colored Population I know many negroes in this county who possess the qualifications required by statute, that is, who are of sound mind and good moral character, who are able to read and write; who have not been convicted of a felony, and who are not under indictment or other legal accusation for theft, and who have paid their poll tax and are qualified to vote. My best estimate is there were about 8,000 such negroes in Harris County in 1938. We have about 400 teachers in our school system who are negroes; about fifty per cent of them are male. There are upward of several thousand negroes in this county who have had a high school education. There is a college for negroes here; they have ten or twelve male teachers. We have a goodly number possessed with the qualifications for grand jurors.

I have lived in Houston twenty-two years. I don't know the number of negroes who have served on grand jurys in Harris County during that period; I know occasionally we have had a negro on the grand jury. I do not know how many served during 1938. The other negroes generally

know about it when a negro serves on the grand jury. Our observation is that one or two negroes have served on grand juries, for instance, Watson and Jim Wilson in his life time seemed to alternate on grand juries. They were not the only two, but they served pretty regularly when negroes were selected. They were sort of standing grand jurors, according to my observation. I know one other negro that served. Both Watson and Jim Wilson were barbers; they were both good citizens; they shaved white people exclusively. Wilson died a few years back and so did Watson. Since they died I recall two negroes who have served on the grand jury in this county, C. W. Rice and a man named Terrell. Terrell is now dead, Rice is a newspaper man here. Outside of those I don't know of any other negroes who have served.

[fol. 40] Cross-examination.

By Mr. Bailey:

Watson has been dead several years, possibly seven or eight. I am sure it's more than three years. I do not know Alex Taylor, a negro grand juror in 1936. I would not necessarily know it if he served. It is general knowledge when a negro serves on a grand jury amongst the negroes, but I don't recall him serving.

There are 8,000 negro poll tax payers in Harris County according to my best judgment. I don't know how many of that 8,000 are women; I have no idea.

My general information as to how they select grand jurors is that they put the names in a wheel, and they are turned in the wheel and pulled out by somebody.

I would say that about 3,000 out of the 8,000 poll tax payers are men, as we have more negro women who pay poll taxes than men, because of being in the profession and other jobs that require that they pay their poll tax.

Mr. Carl Smith, called as a witness on behalf of the Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Freeman:

I am employed in the tax collector's office. I have been there four years. I have the poll tax rolls with me. We

know generally there were about 108,000 poll tax payers in 1937, which, however, includes exemptions, paid certificates and all. I would say about 10,000 or 15,000 of that number were exempt permanently and temporarily, leaving about 85,000 actually paid poll taxes for the year 1937. That includes the colored population. There would be no way of my knowing how many of those were colored people. We put the letter "c" opposite, the colored people, but I wouldn't attempt to estimate how many there were.

C. F. RICHARDSON, called as a witness on behalf of de- [fol. 41] fendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Freeman:

My name is C. F. Richardson. I have lived in Harris County twenty-seven years. I am a newspaper publisher. I publish the "Houston Defender", a weekly paper; it's a colored newspaper, but not exclusively, but it deals with negro events and negro people. Its circulation is about 6,200, which fluctuates some. Generally members of the negro race are our subscribers; we have a few white subscribers. I have been publishing the paper since 1930.

My business has brought me in contact with a large number of negroes in Harris County. I have been in the publishing business here since 1916. I published two other papers, the Houston Observer and the Houston Informer.

One time last year we had the entire poll tax list on a charter proposal, and there were approximately 8,000 colored poll tax payers in Harris County, including men and women and exemptions. I don't know how ma-y of those were householders or free holders. I would say that the majority of those are of sound mind and good moral character.

(At this time, the last witness was excused from the stand temporarily, to allow the following witness to testify, as he was needed elsewhere shortly.)

MR. W. K. RICHARDSON, called as a witness on behalf of Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Freeman:

My name is W. K. Richardson. I am an Assistant Criminal District Attorney. I have been so employed for nearly seven years. The first four years I was indirectly with the Grand Jury on wife and child desertion cases; the last two years and two months I have been directly with the Grand Jury. During that time I have been acquainted [fol. 42] with the person-el of the Grand Juries, directly. There are four grand juries selected each year; one every three months.

During the seven years I have been associated with the Grand Jury, I would say that five or six negroes have served on Grand Juries; that is just a guess. I think, one of those negroes served two different times, not in succession.

I was assigned to the Grand Jury as legal adviser during 1938, and during the August term of 1938. I don't think there was a negro on that Grand Jury. I am pretty sure there was not. There could have been a negro summoned on the panel, and excused. There was one time that there was a negro on the panel, a principal of a school, and he was excused, but I don't recall when that was.

Cross-examination.

By Mr. Bailey:

I have been present on practically all occasions when Judge King and Judge Boyd have charged the Grand Jury commissioners on the selection of Grand Jurors. They have been asked to select citizens from all parts of the county, and of all different races and walks of life.

Redirect examination.

By Mr. Freeman:

The court instructed the Grand Jury commissioners on the law governing the selection of grand jurors. I don't recall seeing any Negro Grand Jury commissioners; they have all been white that I have seen.

C. F. RICHARDSON, recalled as a witness on behalf of Defendant, testified as follows:

Direct examination.

By Mr. Freeman (con't):

I would say that approximately 6,000 of the 8,000 colored poll tax payers were male persons, because 1,500 or more are women. I have checked the poll tax list carefully. I am president of the Houston Branch for the Advancement of Education for Colored People, and also the Negro Cham-[fol. 43] ber of Commerce and on special occasions we get the poll tax lists and set it out to all negro voters as we study it. Based upon that study I say there are about 6,000 male tax payers, who as far as I know would be qualified grand jurors. That estimate is based on the year 1938.

I have never served on a grand jury, or been on the grand jury panel. I can almost count or name the negroes who have served on the grand jury in the last ten years. They are R. L. Anders, deceased; Sam Wilson, deceased; Louis Watson, deceased; Homer McCoy, deceased; C. W. Rice; Newman Dudley. I. M. Terrell, deceased, and the last one to serve, in 1936, was A. W. Taylor, special police officer. Two of them served more than once; one was Louis Watson. Sam Wilson served three or four times. They both ran white barber shops; the others served only once. Alex Taylor was a special officer at the time he served on the Grand Jury.

I found on looking over our newspaper files that there were no negro grand jurors in Harris County during 1938.

We keep a record of them in our newspaper files. There was one negro on the venire of sixteen during 1937, but he was not selected. Alex Taylor served as a grand juror in 1936. As far as my memory serves me he was the only negro to serve on the Grand Jury that year. In the newspaper business we consider it good news when a negro is placed on the Grand Jury, and so we keep a close check. We usually put such an event on the front page with a streamer heading. I don't recall if any negroes served on the Grand Jury in 1935. I don't recall about 1934. I could check our records for those two years, and find out.

Cross-examination.

By Mr. Bailey:

There are 6,000 male poll tax payers among the negro population from the 1938 poll tax roll. That is in Houston, and Harris County. I don't know how many of that 6,000 [fol. 44] are married, or how many of them have been to the penitentiary. That wouldn't show on the records examined. I would say about ninety per cent of that 6,000 are able to read and write the English language, about 1,500 of the 6,000 are women.

I have made quite a study of civic government in connection with the advancement of our race. My understanding of the procedure for selecting grand jurors is to place the list of qualified people in a wheel; sixteen men are drawn out of which twelve are selected.

Redirect examination.

By Mr. Freeman:

I understand that is the jury system: I don't know if it applies to the grand jury or petit jury.

My opinion is that very few who return from the penitentiary pay a poll tax. They can vote if their citizenship is restored. There are very few negroes who have been paying their poll tax, of sound mind and able to read and write, who have been convicted of crime.

I would say that about sixty per cent of the negroes who pay poll taxes are property owners, and a majority of them are married. As a rule those who pay their poll tax represent our better type.

J. E. Robinson, called as a witness on behalf of Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Freeman:

My name is J. E. Robinson. I have lived in Houston thirteen years. I am a colored man, and am somewhat acquainted with the negro population in Harris County. I know C. F. Richardson.

I know the qualifications of a grand juror, and I would say that approximately seventy-five per cent of the colored male population meet that requirement.

I do not know if any negroes served on the Grand Jury [fol. 45] during the year 1938. I have never served on a grand jury. I am connected with the American Woodman Fraternal Life Insurance Company; I am Vice-supreme Commander of that order.

My work brings me in contact with many negroes who are educated and law-abiding citizens.

I know three or four negroes who have served on grand juries in the past ten years. I know Homer McCoy was one; he's deceased. I know of Sam Wilson, I. M. Terrell, both deceased, and C. W. Rice, now living. I don't recall the others who served now. I don't know of any that served in 1938. I would know if any had served.

Cross-examination.

By Mr. Bailey:

I said that seventy-five per cent of the male negro poll tax payers would meet the requirements of a grand juror. A free holder is one who owns property in the county or State; a householder is the head of a house. I would think that the majority of the colored population of males who have paid their poll tax are married men.

I don't exactly know how grand jurors are selected, but I thought it was some kind of a wheel proposition that they shake up the names in. I don't know, but I thought a commission draws the names out of the wheel; the commission is appointed, but I don't know who by; perhaps by the judge or county judge.

Redirect examination.

By Mr. Freeman:

From my experience I would say that the better class of colored people pay their poll tax; those who are educated and law-abiding.

I have never been called to serve on a grand jury. I have never been convicted or accused of a felony. I am able to read and write.

L. L. LOCKHART, called as a witness on behalf of Defend-
[fol. 46] ant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Freeman:

My name is L. L. Lockhart. I am a colored man. I live in Harris County. I have lived here thirty years. I am a retired U. S. Mail carrier. I worked for the U. S. Government twenty-eight years in Houston. I delivered mail to white people. I am deputy grand master of the Colored Masons of Texas.

I come in contact with many negroes in my work; we have thirteen lodges here that I look after. I don't know the number of negro poll tax payers in Harris County.

I have never served on a grand jury. I do not know of any negro serving on the grand jury of Harris County in 1938, or in 1936. I think I have heard of some serving in the last ten years. I think that Sam Wilson served on a grand jury within the last ten years.

I know that most of the negroes in this county can read and write; there are very few illiterate negroes in this county. As far as I know they are all law-abiding citizens, of sound mind, and have not been convicted of a felony. Being a mail carrier I could have served, or could have been excused.

At this time defendant rested temporarily, awaiting arrival of some other testimony.

MR. R. J. LINDLEY, called as a witness on behalf of the State, having been duly sworn, testified as follows:

Direct examination.

By Mr. Bailey:

My name is R. J. Lindley. I am clerk of Criminal District Court No. 2, of Harris County, Texas. I have been its clerk ever since the court was created January 1, 1928. I am deputy district clerk of Harris County, Texas, and chief deputy in the criminal department.

I have in my possession now complete lists of the grand [fol. 47] jurors who were put on the grand jury panels by the grand jury commissioners in the last ten years, as well as the ones who served during that period of time. I have care and custody of these records for both Criminal District Court and Criminal District No. 2 of this county.

In checking the lists for the year 1938 I find that John H. Kerr, a negro, was selected by the Grand Jury commissioners for the February term of 1938; that was in Judge King's court. He is a negro. That's the only one in 1938. John H. Kerr was not excused, but there were twelve qualified grand jurors on the list before him, and his name was not reached.

In checking the lists for 1937 I find that Pierre Marks, a negro, was on the list selected by the Grand Jury commissioners for the November Term of 1937. For the May Term of 1937, H. E. McCoy was selected by the Grand Jury commissioners. He is a negro.

For the year 1936, the record show that Will Wood, colored, address, Pelly, Texas, was on the Grand Jury panel for the November Term of 1936. For the February term of 1936. Alex Taylor, colored, was on the grand jury panel.

For the November term, 1935, Hugh B. Watson, colored, was on the grand jury panel. For the August term, 1935, C. W. Rice, colored. For the May term of 1935, L. G. Luper, colored, was on the list. For the February term of 1935, T. M. Fairchild, colored, is shown.

For the August term, 1934, the name of James D. Ryan, colored, appears. For the May term of 1934, the name of Louis Watson, colored, appears on the list.

For the year 1933, November term, Alex Taylor's name appears. He is colored. For the May term of 1933, Harry Mack, colored.

For the November term of 1932, Alex Taylor's name [fol. 48] appears *appears* again. For the May Term of 1932, Homer E. McCoy, colored. For the February term, 1932, W. P. Cartwright, colored.

For the November term, 1931. John Kerr colored; For the August Term, 1931. Bernice Booth.

Cross-examination.

By Mr. Freeman:

John Kerr was put on the list by the Grand Jury Commissioners; he was not placed on the Grand Jury, because

others on the list were used before his name was called.

Pierre Marks was on the list for the November Term of 1937 but he did not serve for the same reason as Kerr; his name was not reached. He was on the list made up by the Grand Jury commissioners, but he was number thirteen on the list. The lists I have been reading from are those made up by the Grand Jury commissioners. As a general rule the judge calls the first twelve on the lists, and those two happened to be on the bottom of the list.

In the case of H. E. McCoy, May Term of 1937. He did not serve, as he died between the time he was placed on the list and the time the sheriff attempted to summon him, as the sheriff's return shows he was dead. Another negro was not put in his place.

Alex Taylor, whose name was on the list for the February Term of 1936, served on that Grand Jury. He was number sixteen on the list, but he was the twelfth man called.

Will Wood did not serve. He was number sixteen and was excused by the court; it does not show why.

On the list for the November Term of 1935, Q. B. Watson was on the list; but he did not serve; he was number sixteen on the list.

For the August term of 1935, C. W. Rice was on the list; he was sixth on the list. He did not serve, as he was not present and did not answer at the time the jury list was called. The sheriff's return shows he was not served; the [fol. 49] reason is not shown.

(At this time this witness was excused temporarily, to allow the following witness for the Defendant to testify.)

Mr. L. T. Culpepper, called as a witness on behalf of Defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Davis:

I was a member of the Grand Jury commission appointed some time prior to the August Term of 1938, to draw the Grand Jury for that term of court in this county.

I live right at the edge of Goose Creek. I am in the real estate business. I have lived in this county nineteen years. I have been in my present location about eighteen years, having lived in Houston about a year before I went there.

In selecting the men for grand jury service we had a list, and we tried to select men who had not previously served on the grand jury, as best we could. I felt it was our duty to be fair to all classes in the county, and to make the grand jury as representative of all classes as possible, as to race and other matters.

I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race. We selected men from various parts of the county, including my part of the county, one from Goose Creek, one from Highlands and possibly one from La Porte.

I had never met Mr. Card G. Elliott or Mr. George Strake, the other two commissioners, before that time. All three members of the commission were white men. I don't know if any negroes have ever served on the Grand Jury commission or not.

There are a few negroes in the Tri-cities area, but I couldn't tell you how many. I can't say that I know any [fol. 50] negroes down there who possess the qualifications of grand jurors, as I am not very well acquainted with them. I am unable to state how many possess those qualifications.

I thought it was customary to have one negro on the grand jury. The reason I didn't suggest any is because none came to my mind. I couldn't recall any down in my territory.

I didn't know how long Mr. Strake or Mr. Elliot had lived in Houston.

We examined the lists that were given to us. I suppose they were lists of men who had served on the grand jury. We had no suggestion from any source as to who to select for grand jurors. I don't think we had any other list or any directory.

The question of placing a negro on the list came up; one of the other gentlemen brought the question up, but I don't remember which one it was; they tried to think up one that possibly would be okay for grand jury service. As I remember, the names of some few negroes were discussed. I don't recall their names. One of the other two gentlemen brought up their names. As well as I remember, we didn't select any negroes.

The reason I didn't suggest any negroes from the City of Houston is because I wasn't familiar with any, and I didn't know of any that I figured were qualified in my section of

the county. I know less than a hundred down there. I know that the bulk of the negro race in this county lives in Houston. The other members of the commission did not say that they didn't know any negroes in Houston that were eligible.

Cross-examination.

By Mr. Bailey:

The other two grand jury commissioners and I did not intentionally, arbitrarily and systematically discriminate [fol. 51] against putting a negro on the grand jury panel because of his race or color; that is, I did not, and nothing was said by the other two to that effect.

Mr. R. J. Lindley, recalled to the witness stand, on Cross-examination by Defendant, testified as follows:

I want to now correct my last answer a while ago regarding C. W. Rice. I found the sheriff's return shows he was served. He was number six on the list; he was called fifth, as one man ahead of him was excused, and he did not serve, but the reason is not shown on the list.

L. G. Luper, who was on the Grand Jury panel for the May term of 1935, was number sixteen on the list; he was not selected because twelve men were used before they got to his name.

T. M. Fairchild, who was on the list for the February Term of 1935, was number sixteen on the list, and he is marked "Excused" on the list; he was not among the twelve that served.

For the August term, 1934, James D. Ryan was number sixteen on the list. He did not serve. No reason is shown, except "Excused." The court is the only one authorized to excuse a man.

For the May Term of 1934, Louis Watson was number sixteen on the list. He served on the grand jury for that term.

Alex Taylor who was number sixteen on the list for the November term of 1933 served on that grand jury. I don't know if he served on other grand juries; I will have to check back.

Harry Mack, who was number sixteen on the grand jury panel for the May Term of 1933 did not serve. There is

no reason shown, but the last three on the list were excused; they got twelve grand jurors before they reached the last three.

[fol. 52] Homer E. McCoy, who was number sixteen on the list for the May Term of 1932, served on that grand jury; he was juror Number twelve.

W. P. Cartwright, who was number sixteen on the list for the November term of 1931, served on that grand jury.

Bernice Booth did not serve on the grand jury for the August term of 1931. He was number sixteen on the list.

During 1931 and all other years there are four terms of court, and four grand juries selected. During 1938 there were sixty-four names on the lists all together; there were only one negro's name out of that. I have never seen a negro grand jury commissioner since I have been connected with this court, January 1, 1928.

At this time counsel for defendant offered and introduced in evidence record of the United States Chamber of Commerce, Bureau of Census, showing that the population of Harris County, Texas, according to the Census of 1930, is 359,328.

Defendant Rested.

JUDGE LANGSTON G. KING, called as a witness by the State, having been duly sworn, testified as follows:

Direct examination.

By Mr. Bailey:

I am judge of Criminal District Court No. 2 of Harris County, Texas, and have been for over ten years.

Twice annually I have occasion to select the Grand Jury commission. I select three men. I try to get them from different sections of the county; generally two from Houston, because of the tremendous population, and one from some other section who is an outstanding citizen and qualified in every respect for jury service and for that service.

At the time they are appointed and sworn I instruct them to select sixteen men, qualified grand jurors, following the statutory qualifications, and tell them what they are, and that there must be no discrimination against any race, color,

[fol. 53] religion or anything else. I have reminded them particularly of the negro population each time, though I could not instruct them who to put on the grand jury, and that the negro race must not be discriminated against.

Several times since I have been here negroes have served on the Grand Jury. I don't know how many different races of people there are in this county, but I imagine there are as many or more than sixteen; there are Greeks, Italians, Mexicans, Czechs, Germans, negroes and others.

Cross-examination.

By Mr. Davis:

I would think that practically all of the citizens of this county are caucasians except those who belong to the negro race. The number of Japanese and Chinese or Indians is negligible. I do not know what the negro population of this county is; I know we have a large negro population, probably the largest of any city in the State.

I have always instructed the grand jury commissioners to select men without reference to creed or color, and to get a fair representation of all classes, as far as possible with sixteen men. There has only been one negro on the grand jury panel at one time. I don't know why the negro on the grand jury panel has been number sixteen; it hasn't been that way all of the time, but practically all of the time. I don't know why, with the one or two exceptions, the negro has always been below the twelfth man. I never know before the list is opened by the Clerk what men the grand jury commissioners have selected.

I have been a citizen of Harris County about eighteen years. Prior to being on the bench I was an assistant criminal district attorney, under Mr. Soule. I don't know of any negro being a grand jury commissioner since as far back as 1925.

It is my recollection that John Kerr, a negro, was on [fol. 54] grand jury the early part of 1938, but the record would better show that.

I know a large number of negro citizens in this county. I have no idea of how many would be qualified grand jurors, except from what these negroes have testified here this morning.

I knew Richardson, who testified, before, and I knew that first negro, and the mail carrier, I had seen him before.

The insurance man, I may have seen before, but I have no acquaintance with him. As far as I know they stand well generally as citizens of this county.

Redirect examination.

By Mr. Bailey:

I heard the testimony naming some eighteen negroes who have been drawn by the grand jury commissioners since 1931. I don't know the reason in each case why some were excused. I remember that Will Woods came into court with a doctor's certificate and said he was absolutely unable to serve, and I remember that after McCoy was put on the list by the grand jury commissioners we learned that he had died. In the other instances the negro would usually be number sixteen on the list, and as I understand it the statute says that the first twelve qualified will be selected as the grand jury; in fact, often the last two or three white men on the list are not reached as grand jurors. I have never failed to place a negro on the grand jury because of his color; that is, I have never excused one for that reason.

Cross-examination.

By Mr. Davis:

I customarily select the first twelve from the list of sixteen to serve. Seldom do you have over twelve men present and able to serve as grand jurors; sometime you have to pick up additional men; I had to pick up four or five men one time; that is, the sheriff picked them up. That has only [fol. 55] been done when we did not have twelve men present.

Reporter's Certificate to foregoing transcript omitted in printing.

AGREEMENT AS TO STATEMENT OF FACTS

It is agreed that the foregoing is a correct statement of all the facts given in evidence on hearing on motion of the defendant to quash the indictment in above numbered and entitled cause, at said term, in said court.

Witness our signatures on this the 25th day of July, A. D. 1939.

Tom Bailey, Allie L. Peyton, For the State, Sam W. Davis, Harry W. Freeman, Attorneys for Defendant.

[fol. 56] Order Approving Statement of Facts

The foregoing Statement of Facts on the hearing on motion to quash the indictment in the foregoing styled and numbered cause, was submitted to me by the parties, and upon examination of the same I find it to be correct, and approve it and order the same to be filed by the Clerk of this Court as a part of the record in said cause.

This the 25th day of July, A. D. 1939.

(Signed) Langston G. King, Judge, Criminal District Court No. 2 of Harris County, Texas.

[File endorsement omitted.]

[fol. 57] In Criminal District Court No. 2 of Harris County

[Title omitted]

Bill of Exceptions No. 2—Filed July 31, 1939

Be It Remembered that on May 17, 1939, after the prosecutrix, Mrs. Linda Heiden, had already testified as the first witness for the State and had been cross examined at length by counsel for the defendant touching acts of familiarity with the defendant over several months, and had without emotion or apparent constraint or sense of shame denied such acts of familiarity, and after the defendant had testified to such acts of familiarity on the part of said prosecutrix towards him, and that the act of intercourse for which he is being tried as for rape was with the consent and at the invitation of prosecutrix, that thereafter on rebuttal said Linda Heiden was recalled to the stand as a witness by the State, when to each act of familiarity about which she had been previously examined at the outset of the trial she testified in denial with great emotion, crying out in a loud

and pitiful voice and calling upon God to bear witness to the truth of her statement, and then swooned and "passed out", all of which took place while she was in the presence of the jury and on the witness stand.

Thereupon, upon motion of defendant, the jury was temporarily retired from the court room, and prosecutrix who had fainted was carried from the court room.

After the retirement of the jury the defendant moved the court for a mistrial on the ground that such a scene as was enacted and above described, the prosecutrix being a white woman and the defendant a negro, greatly prejudiced the jury, and on the further ground that said conduct and be- [fol. 58] havior of the prosecutirx made it impossible for counsel for defendant to continue her cross examination and resulted in counsel for defendant actually foregoing such further cross examination but said motion was by the court overruled, to which action of the court defendant then and there excepted and gave notice of appeal.

That defendant was found guilty as charged and his punishment fixed by the jury as life imprisonment.

Sam W. Davis, Harry W. Freeman, Attorneys for Defendant.

ORDER

The foregoing bill of exception No. 2 having been adduced to writing by the attorneys for defendant, Edgar Smith, and having been presented to the undersigned judge of said court before whom said motion was heard within the time required by law and having been duly considered and found to be correct, is hereby allowed, approved and ordered filed by the clerk of this court as a part of the record in such cause, subject to the following qualifications:

The court does not certify that the prosecutrix had shown no emotion or apparent constraint or sense of shame in denying such acts of familiarity, nor does the court certify as to her emotion, constraint or sense of shame;

The court does not certify that the prosecutirx upon being recalled to the stand was again examined about the acts of familiarity about which she had previously testified, but that on rebuttal she was asked by the State about each statement made by the defendant, and was only asked

whether such statements were true or not, and the court is not certifying that anything happened in connection with this witness' conduct or behavior that did, or in any way might, prejudice the jury, nor does the court certify that the prosecutirx swooned and "passed out".

[fol. 59] The court does not certify that the jury was retired upon motion by the defendant, but asserts that the same was done upon the court's own motion, and that when the jury returned to the court room the court instructed the jury as follows: "Gentlemen of the Jury: I want to instruct you at this time that you will not consider in this case, for any purpose whatever, the conduct of the witness that you have just seen from the stand or any answers she made to any questions that were not respo-sive to questions; any statement she made not in response to questions by counsel you will not consider for any purpose."

The court is not certifying that there was any conduct or behavior on the part of the prosecutrix at said trial that made it impossible for counsel for the defendant to continue the cross-examination of her, and the court is not certifying that there was any behavior or conduct on the part of the prosecutrix that resulted in counsel for the defendant foregoing any further cross-examination of her, but said witness was present and in attendance upon the court, and as far as the court knows was thoroughly capable of continuing to testify.

This the 29th day of July, A. D. 1939.

Kenneth McCalla, Judge presiding.

[File endorsement omitted.]

[fols. 60-140] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 141] In Court of Criminal Appeals of Texas

No. 20,768

Edgar Smith, Appellant,

v.

The State of Texas, Appellee

Appeal from Harris County

Opinion—January 24, 1940

The offense is rape. The punishment assessed is confinement in the state penitentiary for life.

The evidence offered by the state shows a case of rape by force. Appellant made a confession to the officers in due form, which confession if true, showed appellant to be guilty of the offense. On the trial, appellant took the witness stand and repudiated the confession. He claimed that the act of intercourse was with the consent of prosecutrix. The only issue raised by his testimony was whether or not she consented to the act, and this the jury decided adversely to his contention.

Appellant complains of the action of the court in overruling his motion to quash the indictment on the ground that the jury commissioners selected by the district judge to draw a grand jury for the August Term (at which term appellant was tried) had intentionally and arbitrarily excluded all persons of African descent from serving thereon. He alleged that he was a member of the negro race and that the practice of excluding negroes from grand and petit juries had been resorted to and systematically engaged in by the jury commissioners for a number of years preceding the time of the return of the indictment on which the prosecution was based. That these acts were in con-ravention of — 14th Amdt. to the Constitution of the United States and in violation of Art. 1 of the Constitution of the State of Texas, etc.

This motion was contested by the state and the Court heard evidence thereon. We do not deem it necessary to set out the evidence at length, but it is our opinion that the same wholly fails to show an intentional and arbitrary refusal to select negroes for grand jury service on the panel that returned the indictment against the appellant. All of the grand jury commissioners stated there was no express and intentional disregard for members of the negro race. [fol. 142] Appellant is then relegated to contending that the discrimination is shown by the long continued and uninterrupted failure to summon a member of the negro race for grand jury service as showing discrimination as a matter of law. The evidence in this respect shows that on a number of previous occasions, the jury commissioners had selected negroes as prospective grand jurors. It is shown that in 1936 a negro served on the grand jury, and others had been repeatedly drawn for the grand jury panel—both prior and subsequent thereto. We think the evidence presented was such that the court was justified in reaching the conclusion that race discrimination was not intentionally

and deliberately practiced by the jury commissioners. The case of Johnson vs. State, 124 S. W. (2d), 1001 and authorities there cited are not in point, since the evidence in this case is conflicting. Appellant admits in his able brief that none of the cases cited by him are exact authorities, but insists that the only distinction is one of form—that in those cases it clearly appeared that there was discrimination, while in the case at bar discrimination is covered by a veneer which seems to be a scheme to avoid those decisions. A sufficient answer to any such contention is that the evidence does not show an arbitrary discrimination and we would not be justified in ferreting out such schemes when the evidence was sharply conflicting as to the existence of discrimination at all. This is rather a serious charge against the officers charged with the administration of the law. They are not only presumed to fairly and impartially administer the same, but under their oath are bound to do so; and in the absence of clear and convincing proof to the contrary, the presumption obtains that they did so. See Lugo vs. State, 124 S. W. (2d), 344, Hamilton vs. State, No. 20,727, not yet reported. Wash. vs. State, 103 S. W. 879.

[fol. 143] By bill of exception number two, appellant complains because the court declined to grant appellant's request to declare a mistrial after prosecutrix was recalled by the state and asked if the various acts of familiarity by her with appellant (as testified to by him) were true; that she emphatically denied them and called upon God to bear witness to the truth of her statement of the case and then fainted. That the behavior of prosecutrix in fainting made it impossible for him to continue his cross-examination of her without prejudicing the jury against him. The court states in his qualification of the bill that he does not certify that anything happened in connection with this witness' conduct or behavior which would prejudice appellant cause in the eyes of the jury or that prosecutirx swooned and passed out, etc. He also states that this witness, after the occurrence in question was in attendance upon the court and was capable (as far as the court knew) to continue testifying. The bill, with the court's qualification thereto, was accepted by appellant and he is bound thereby. As thus qualified it fials to reflect reversible error, since such qualification would indicate that all that really happened was that the witness cried out for God to bear witness to the

truth of her statements, and fainted. The court instructed the jury to disregard such conduct, and any statements not made by her in response to questions. It also appears that the jury was immediately retired. It is not alleged that such conduct on her part was intentional. To the contrary it is inferable that it was the result of long and protracted questioning of a white woman who had been assaulted by a negro. Under the circumstances, we do not think this matter reflects reversible error. See Long vs. State, 127 S. W., 551; Barge vs. State, 167 S. W. 63.

There are a number of special requested charges which were submitted by appellant to the trial court. It appears, however, that the appellant did not except to the refusal of the trial court to give these charges. Consequently, we are [fol. 144] not authorized to consider them. It has been repeatedly held that it must be made to appear affirmatively that exception was reserved to the refusal of special charges before they were properly before us for review. See Cunningham vs. State, 97 Tex. Crim. Rep., 624, 262 S. W., 491, Craven vs. State, 93 Tex. Crim. Rep. 329, 247 S. W. 515; Brooks vs. State, 247 S. W. 517; Lindner vs. State, 250 S. W. 703, Tex. Juris, p. 99 and the authorities there collected.

All other matters complained of by appellant have been considered by us and are deemed to be without merit.

The judgment of the trial court is affirmed.

Kreuger, Judge.

(Delivered January 24, 1940.)

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

[fol. 145] In Court of Criminal Appeals of Texas

Appeal from Harris County

No. 20,768

Edgar Smith, Appellant,

vs.

The State of Texas, Appellee

Opinion on Appellant's Motion for Rehearing—February 21, 1940

Appellant reiterates his contention that the jury commission intentionally and arbitrarily excluded all persons

of African descent in selecting the grand jury. Looking to the testimony heard upon the motion to quash the indictment, it is observed that we were in error in our statement in the original opinion that all the jury commissioners testified that there was no intentional exclusion of members of the negro race from the grand jury. Only two of the commissioners testified upon the hearing. Mr. Elliott, one of the commissioners, testified that he did not recall whether any negroes were drawn by the commission. He said that the names of some negroes were mentioned during the time the selection was being made. Further, he testified that he did not suggest a negro because he did not know the name of any negro at the time living in Harris County who possessed the qualifications of a grand juror. On his cross-examination he said: "I did not intentionally arbitrarily and systematically discriminate against any negro being selected on that grand jury." Mr. Davis, the other member of the jury commission who testified upon the hearing, said that in selecting the grand jury he felt that it was the duty of the commission "to be fair to all classes in the county." Further, he testified that he suggested the name of no negro because he was not personally acquainted with any member of the negro race. Upon cross-examination he said: "The other two grand-jury commissioners and I did not intentionally, arbitrarily and systematically discriminate against putting a negro on the grand jury panel because of his race or color; that is, I did not, and nothing was said by the other two to that effect." It appears from the agreement entered into between the district attorney and counsel for appellant that in 1930 there were 72,603 negroes in Harris County, including men, women and children. Furthermore, it appears that in 1937 between 7,000 and 8,000 negroes paid their poll taxes. Again, it was shown that a [fol. 146] large number of negroes possessed the quaiifications of grand jurors. W. K. Richardson, a witness for the state, testified that four grand juries were selected each year. He said: "During the seven years I have been associated with the grand jury I would say that five or six negroes have served on some grand juries; that is just a guess. I think one of those negroes served two different times, not in succession." He testified that there was no negro on the grand jury that indicted appellant. At this juncture we quote from his testimony, as follows: "I have been present on practically all occasions when Judge King

and Judge Boyd have charged the grand jury commissions on the selection of grand jurors. They have been instructed to select citizens from all parts of the county and of all different races or walks of life. The court instructed the grand jury commissioners on the law governing the selecting of grand jurors. I do not recall seeing any negro grand jury commissioner; they have all been white that I have seen."

C. F. Richardson, a witness for appellant, testified that there were approximately 6,000 negro men who paid poll taxes in Harris County during the year 1938. He could not say how many of these men possessed the qualifications of grand jurors. We quote from his testimony as follows: "I can almost count the names of the negroes who served on the grand jury in the last ten years." The witness named approximately seven negroes.

Several negro men testified that they had never served on a grand jury. Their testimony was to the further effect that they possessed the qualifications of grand jurors. There was testimony to the effect that there were very few illiterate negroes in the county. There was also testimony to the effect that about eighteen negroes had been drawn by the jury commission for grand jury service since 1931. The clerk of Criminal District Court No. 2 of Harris County testified that on several occasions the negro on the panel was number sixteen. However, his testimony was to the further effect that negroes had been serving on the grand juries.

The trial judge testified that he made it a rule to instruct the jury commissioners that there should be no discrimina-[fol. 147] tion against any race, color or religion. He said: "I have reminded them particularly of the negro population each time, though I could not instruct them who to put on the grand jury, and that the negro race must not be discriminated against. Several times since I have been here negroes have served on the grand jury. I don't know how many different ra es of people there are in this county. * * *"

Appellant insists that the holding of this court in Johnson v. State, 124 S. W. (2d) 1001, is controlling. He also relies upon the case of Norris v. Alabama, 294 U. S. 578, 79 L. Ed. 1074, and Pierre v. State of Louisiana, 306 U. S. 354, and other cases which he cites in his brief. In the Norris Case

the evidence showed that for a long number of years no negroes had been selected for jury service, witnesses saying that none had ever been so called within their memory, the ages of such witnesses ranging from 50 to 76 years. In reaching the conclusion that Norris, who was a negro, had been discriminated against in the selection of the grand jury, the Supreme Court of the United States said: "That testimony in itself made out a prima facie case of the denial of the equal protection which the Constitution guarantees." In Johnson v. State, supra, it was shown that for thirty years no person of the negro race had been selected as a grand juror, during which time a number of persons belonging to said race lived in the county who were qualified voters and qualified to serve on grand juries. In holding that the indictment against Johnson, who was a negro, should have been quashed because he had been discriminated against in the selection of the grand jury, we followed Norris v. Alabama, supra, and Hale v. Commonwealth of Kentucky, 82 L. Ed. 1050.

We think the present case is distinguishable upon the facts from the cases upon which appellant relies. Here it is made to appear that negroes had been drawn for grand jury service during the last ten years. It is true that in some cases those who were drawn did not serve. However, negroes had served on the grand jury during such period of time. We do not understand that the different classes composing the population of a county must have equal representation upon the grand jury. The question for our de- [fol. 148] termination is whether the trial judge was warranted in concluding from the testimony adduced upon the motion to quash that negroes had been intentionally excluded from the grand jury because of their race. The court heard the testimony of two of the grand jury commissioners to the effect that discrimination had not been practiced. Further, he heard testimony to the effect that negroes had been selected for grand jury service and that several negroes had served on the grand jury during the last ten years. In view of such testimony, we would not feel warranted in holding that the trial judge abused his discretion in overruling the motion to quash. To hold otherwise would be to say that every grand jury must have a member of the negro race on the panel before an indictment can be properly returned against any member of such race, notwithstanding

the testimony warrants the conclusion that there had been no arbitrary discrimination against the negro race. It follows from what we have said that we are constrained to adhere to the conclusion expressed in the original opinion.

Appellant insists that the evidence fails to comport with human experience because it was shown that appellant remained at the home of the prosecutrix after he had had sexual intercourse with her. It appears to be appellant's contention that the fact that he did not leave the scene of the alleged rape destroys the testimony of the prosecutrix to the effect that she was forcibly ravished and warrants no other conclusion than that she consented to the act of intercourse. According to the testimony of prosecutrix, appellant grabbed her in her home, forcibly carried her to a bed, and by the use of force which she was unable to overcome, had an act of sexual intercourse with her. Not only the testimony of prosecutrix, but that of other witnesses, shows that she immediately reported the matter to a neighbor. She was greatly excited at the time of making the report. An examination by a physician disclosed that some one had had an act of intercourse with her. The physician who examined her testified, in part, as follows:

[fol. 149] "I examined Mrs. Heiden. She was terribly shocked and she told me she had been attacked by a negro. Mrs. Middlestedt did most of the talking. I made a vaginal examination and found some serous fluid there mixed with quite a little blood. I couldn't make a successful microscopic of it; I turned it over to Professor Oliphant, and he went to the school building to make it.

"I saw some slight scratches on her upper and lower limbs. I did not see any bruises on her wrists. The scratches on her limbs were such as could have been made from briars or brush. There was no discoloration of her wrists that I could ascertain at the time I examined her. The lower limbs were scratched up more than the upper ones. They appeared to be briar scratches.

"I made a vaginal examination; I found some serous fluid mixed up with quite a bit of hemorrhage; the posterior wall of the hymen was bleeding. The bleeding was such as might result from intercourse with a young strong man.

"I talked to Mrs. Heiden at the time I examined her, but she talked in German some and I couldn't understand it; she couldn't tell me much as she was badly unnerved and

shocked. She talked in German to Mrs. Middlestedt, and she told me. I did not give Mrs. Heiden a douche; I just mopped her out. Mrs. Heiden told me she had been attacked by this negro."

We quote from appellant's written confession as follows:

"I have been working for Mr. Heiden for the past seven months working out there on his farm doing farm work, during the time that I have worked there I was fed from their kitchen, and my salary was eighteen dollars a month and board. Last Monday I worked on the farm chopped peas, that afternoon when I finished cutting peas I drove up the cows.

"I rode my horse up in the yard after I drove the cows up, and I spoke to Mrs. Heiden's brother Adolph Strack, [fol. 150] after he left the children came up in the truck with Mrs. Heiden's two son-on-laws they did not stay but a few minutes, and when they left Mrs. Heiden's daughters were in the truck also, they all drove off in their cars and I did not hear them say where they were going, when they left I went in the house to get the milk bucket Mr. Strack was in the house and I spoke to him, and then I went out to milk and while I was mil-ing Mr. Strack left.

"When I came back from milking I asked Mrs. Heiden to fix my supper. She told me she did not have time and for me to fix it myself as she was busy peeling pears, then I fixed my supper, Mrs. Heiden was on the front side gallery, the next thing happened Mrs. Heiden came in the kitchen and then went out in the yard and got some clothes * * * After she got in the room then I caught her by both arms this was in the back bed room after I grabbed her I laid her on the bed, I turned the left arm loose first and pulled up her dress, then I pulled up her dress that is when I put my privates into her privates, after I put it in her I held both wrist- again.

"I was on her for about four or five minutes until I finished and cum. When I got up I went out the back and she was still in the house and I did not see her when she left the house, then I went out on the front porch and laid down and stayed there until her two son-in-laws came up and took me down on the road where we met some more people and they all took me over to Paul Middlestedt's where the officers were, after I committed this act I do not know why I stayed

there but I did, after this was over I did not wash and have not washed since, I had only one sexual intercourse with Mrs. Heiden.

"The bruises on Mrs. Heiden's arms are from where I held her, at the time that I released the left arm is when I raised up her dress and had sexual intercourse with her, she hollered quit twice."

[fol. 151] It is true that appellant repudiated his confession and gave testimony to the effect that prosecutrix invited him to have sexual relations with her. In short, it was his version that she freely consented to the act. The state took issue with appellant, and offered testimony to the effect that the identical confession introduced in evidence had been made by appellant and that no coercion or persuasion of any character had been used at the time such confession was made. This issue was properly submitted to the jury for their consideration.

Looking to the testimony in its entirety, we are constrained to adhere to the conclusion expressed in the original opinion that the evidence is sufficient to support the judgment of conviction.

The motion for rehearing is overruled.

Christian, Judge.

(Delivered February 21, 1940).

The foregoing opinion of the Commission of Appeals has been examined by the Judges of the Court of Criminal Appeals and approved by the Court.

[fol. 152] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AND WAIVER BY ATTORNEYS OF RECORD

The undersigned, Gerald C. Mann, Attorney General of Texas, and Lloyd Davidson, State's Attorney before the Court of Criminal Appeals of Texas, Attorneys of record and charged by law with the duty of representing the State of Texas in this cause, hereby acknowledge due and timely receipt from the attorneys for petitioner of copy of petition for writ of certiorari and supporting brief containing a

statement of points upon which petitioner intends to rely in the Supreme Court of the United States, and hereby waive designation of the parts of the record to be printed, and further agree that the copy of the record certified by Olin W. Finger, clerk of the Court of Criminal Appeals of Texas,—said certified copy consisting of the transcript (60 pages) and statement of facts (78 pages) forwarded to the Court of Criminal Appeals by J. W. Mills, clerk of the Criminal District Court No. 2, Harris County, Texas, and copy of the opinions (11 pages) rendered in this cause by the Court of Criminal Appeals,—contains the entire record herein material and necessary to the consideration of this cause by the Supreme Court of the United States, and we do hereby waive the right to file counter-designation of parts of the record to be printed and any and all further service and notice.

Dated at Austin, Texas, this March 11th, 1940.

Gerald C. Mann, Attorney General of Texas, by Geo. W. Barens, Assistant; Lloyd W. Davidson, State's Attorney Before the Court of Criminal Appeals of Texas. Harry W. Freeman, Sam W. Davis, Attorneys for Petitioner.

[fol. 153] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 154] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD—Filed May 13, 1940

The undersigned, Gerald C. Mann, Attorney General of Texas, and Lloyd Davidson, State's Attorney before the Court of Criminal Appeals of Texas, Attorneys of record and charged by law with the duty of representing the State of Texas in this cause, and William A. Vinson, Sam W. Davis and Harry W. Freeman, attorneys of record for petitioner, do hereby agree that the "Statement of Facts", consisting of 78 pages (short sheets), and containing the evidence adduced upon the trial of the issue of guilt, may be omitted from the record to be printed herein, and also that the opinions of the Court of Criminal Appeals (now re-

ported in Vol. 136 S. W. (2d) pp. 842-847) attached to the petition as exhibits A and C, may be omitted altogether or printed either as such exhibits or as part of the record.

Dated at Austin, Texas, this May 8th, 1940.

Gerald C. Mann, Attorney General of Texas, by Geo. W. Barens, Assistant Atty. General; Lloyd W. Davidson, State's Attorney Before the Court of Criminal Appeals of Texas. Wm. A. Vinson, Sam W. Davis, Harry W. Freeman, Attorneys for Petitioner.

[fol. 154½] [File endorsement omitted.]

[fol. 155] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the Court of Criminal Appeals, State of Texas, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: In forma pauperis. Enter William A. Vinson. File No. 44,225. Texas, Court of Criminal Appeals. Term No. 818. Edgar Smith, Petitioner, vs. The State of Texas. Petition for a writ of certiorari and exhibit thereto. Filed March 18, 1940. Term No. 818, O. T., 1939.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 33

EDGAR SMITH,

Petitioner,

vs.

STATE OF TEXAS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

WM. A. VINSON,
HARRY W. FREEMAN,
SAM W. DAVIS,
Counsel for petitioner.

INDEX.

Subject Index.

Table of Cases Cited.

STATUTES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 33

EDGAR SMITH,

Petitioner,

vs.

STATE OF TEXAS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edgar Smith, respectfully prays for a Writ of Certiorari herein to review a certain final decision of the Court of Criminal Appeals of Texas, being the highest court of said State in which a decision could be had, the original opinion and decision of said court having been rendered on January 24, 1940 (R. 43-46), and a motion for rehearing having been filed within the time provided by the laws of said State (a copy of which is hereto attached, marked "Exhibit A") was, after being entertained and considered by said court, overruled by a written opinion rendered on February 21, 1940 (R. 46-52).

Statement of the Grounds of Jurisdiction.

This cause originated in the Criminal District Court No. 2 of Harris County, Texas, wherein petitioner, a negro farm boy eighteen years of age at the time of his arrest, was charged by indictment with the offense of rape upon the person of Linda Heiden, a white woman, on or about August 1, 1938, in Harris County, Texas. Being poor and friendless, without known family or relatives, your petitioner was unable to secure the services of paid counsel and therefore, as provided by Article 494 of the Code of Criminal Procedure of Texas, the Hon. Langston G. King, judge of said court, appointed Harry W. Freeman and Sam W. Davis, attorneys, to defend him.

In due time petitioner, through his said counsel, presented to the judge of said Criminal District Court a motion to quash the indictment on the ground that petitioner had been denied the equal protection of the laws guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, by Section 19 of Article 1 of the Constitution of the State of Texas (Bill of Rights) and Article 338 of the Code of Criminal Procedure of the State of Texas, in that the Grand Jury Commissioners of Harris County, Texas, had arbitrarily and systematically for a period of many years excluded all persons of African descent from serving on the Grand Jury, or, in any event, the number of negroes selected by the Grand Jury Commissioners for service on the Grand Jury for many years prior to the indictment of petitioner had been so negligible as in itself to show and establish such unlawful discrimination and that such discrimination was particularly practiced in the selection of the Grand Jury for the term of said court at which the indictment against your petitioner was returned, by excluding all qualified negro citizens solely because of their race or color and not because such negro citi-

zens lacked the qualifications prescribed for Grand Jurors in the State of Texas by Article 339 of the Code of Criminal Procedure of said State. ("Exhibit B".)

The State filed an answer contesting the motion. In due time said motion came on for hearing, and all the testimony so adduced is embodied in appellant's Bill of Exceptions No. 1 (R. 21-40). At the conclusion of such testimony, the Trial Court entered an order overruling the motion (R. 9). Upon a trial of the issue of guilt, your petitioner was convicted and sentenced to confinement in the State Penitentiary for life. Petitioner timely presented, in the manner and form provided by law, an appeal from the judgment of the Criminal District Court to the Court of Criminal Appeals of Texas, which court on January 24, 1940, after having heard and considered said cause, entered its judgment in all things affirming the judgment of the Criminal District Court (R. 43-46). Thereafter, your petitioner within the time and in the manner required by law, filed his Motion for Rehearing in the Court of Criminal Appeals of Texas, and such motion was in all things overruled by said Court of Criminal Appeals on February 21, 1940 (R. 46-52).

The Court of Criminal Appeals of Texas is the court of last resort in all cases of a criminal nature prosecuted under the laws of Texas, and is the highest court of said State in which a decision of this cause could be had; that it is constituted the court of last resort and the highest court of criminal jurisdiction by the provisions of Section 5 of Article 5 of the Constitution of the State of Texas ("Exhibit C") and that the judgment of the Court of Criminal Appeals of Texas upon overruling petitioner's motion for rehearing is final and conclusive unless it be reversed by the Supreme Court of the United States. (Article 819 Code of Criminal Procedure of Texas, "Exhibit D".)

The judgment of the Court of Criminal Appeals is a final judgment within the purview of section 344 (b) Title 28

U. S. C. A. (section 237 of the Judicial Code, amended), reading as follows:

> "Or where any title, right, privilege or immunity is especially set up or claimed by either party under the constitution * * * and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied * * *"

And paragraph 5(a) Rule 38, of the Rules of the Supreme Court, as follows:

> "Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Sole Question for Decision.

The only question involved in this cause is: Must a negro defendant in a State Criminal Court introduce evidence showing a *total exclusion* of members of his race from grand juries in order to establish a violation of the equal protection clause of the Fourteenth Amendment? In other words, may officers of a State tribunal cover up their intended discrimination against the negro race by a thin veneer of compliance and thereby evade the prohibition of the Fourteenth Amendment?

Sole Proposition.

Where twenty per cent of a county's population is comprised of negroes of whom from six to seven thousand possess the statutory qualifications for grand jurors, and the undisputed evidence shows that *occasionally* throughout a period of nearly ten years, *one negro* is selected by all-white Grand Jury Commissioners but is placed in such an unfavorable position on the panel (*sixteenth on the list*) as to make it unlikely that he will be selected by the judge in impaneling

the Grand Jury, and the evidence further shows that no negro had been a member of the last ten consecutive Grand Juries, including the one which indicted petitioner, it constitutes a denial of the spirit of the equal protection of the laws within the meaning of the Fourteenth Amendment, and the Court of Criminal Appeals of Texas erred in holding to the contrary.

The Court of Criminal Appeals of Texas held in effect that because the evidence did not show such total exclusion, or, in other words, because the evidence did show that during a period of nearly ten years five negroes actually served on Grand Juries in Harris County, though none had served upon ten consecutive Grand Juries, including the one which indicted petitioner, unlawful discrimination was not established. In his motion for rehearing ("Exhibit A") your petitioner assigned as error the complaint of holding of the Court of Criminal Appeals, pointing out and calling that court's attention to certain undisputed evidence which he contended established the prohibited discrimination as a matter of law *when judged by its effect and not by its form.*

In support of the foregoing grounds for the writ, your petitioner submits the accompanying brief showing more fully the precise facts and arguments applicable thereto.

Wherefore, your petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment of the Court of Criminal Appeals of Texas, that its judgment be reversed, and that the motion to quash the indictment herein be sustained.

EDGAR SMITH, *Petitioner,*
WM. H. VINSON,
HARRY W. FREEMAN,
Sterling Bldg.,
Houston, Texas,
SAM W. DAVIS,
His Attorneys of Record.

STATE OF TEXAS,
County of Harris,
Southern District of Texas:

Edgar Smith, being duly sworn, deposes and says:

I am now confined in the County Jail of Harris County, Texas; I am the petitioner named in the foregoing petition for certiorari, have carefully read the same and know the contents thereof, and that the same are true of my own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters I believe them to be true.

EDGAR SMITH.

Subscribed and sworn to before me this 6th day of March, 1940.

J. S. BRACEWELL, JR.,
[SEAL.] *Notary Public, Harris County, Texas.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 33

EDGAR SMITH,

Petitioner,

vs.

STATE OF TEXAS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

Petitioner, a penniless and friendless negro farm boy, eighteen years of age at the time of his arrest, was convicted for rape upon a white woman and sentenced to confinement in the State Penitentiary for life.

The undisputed testimony shown by the record reveals this to be a very strange case, perhaps the strangest ever tried by a court in the South or elsewhere. For such undisputed testimony, in fact testimony given by Everett Franklin, a son-in-law of prosecutrix, shows that following the alleged commission of the offense this negro boy was found by the witness lying down on the front porch of the

house where the offense is alleged to have taken place, and *he was aroused from his sleep by the witness.* And what is quite significant no less than strange is the fact, established by the undisputed testimony given by the defendant and the witness, Everett Franklin, that the accused was asked by this witness, apparently in the most casual manner, "What's the matter between you and my mother-in-law?" To which the defendant answered: "It wasn't anything as I knows of." Throughout the trial, petitioner maintained his innocence, testifying that the act of intercourse had taken place at the invitation and with the consent of prosecutrix.

Errors Below Relied on Here.

Petitioner relies on the following points:

1. The trial and conviction of a negro upon an indictment found and returned by a grand jury of white persons, from which all qualified negroes had been excluded solely on account of face or color, pursuant to a long continued and established practice, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and the Court of Criminal Appeals of Texas erred in holding to the contrary.

2. Where twenty per cent of a county's population is comprised of negroes of whom from six to seven thousand possess the statutory qualifications for grand jurors, and the undisputed evidence shows that *occasionally* throughout a period of nearly ten years, *one negro* is selected by all-white Grand Jury Commissioners but is placed in such an unfavorable position on the panel (*sixteenth on the list*) as to make it unlikely that he will be selected by the judge in impaneling the grand jury, and the evidence further shows that no negro had been a member of the last ten consecutive grand juries, including the one which indicted petitioner,

it constitutes a denial of the spirit of the equal protection of the laws within the meaning of the Fourteenth Amendment, and the Court of Criminal Appeals of Texas erred in holding to the contrary.

3. The trial court denied petitioner's rights to equal protection of the laws under the Fourteenth Amendment in overruling his motion to quash the indictment on the ground that qualified negroes had been excluded from the grand jury solely on account of race or color, and the Court of Criminal Appeals of Texas erred in affirming the judgment of the trial court.

Proof of Exclusion.

Card G. Elliot, one of the Grand Jury Commissioners who selected the Grand Jury for the August term of 1938, when this defendant was indicted, testified (R. 21-25) that they selected the grand jurors merely from their personal acquaintance with the people over the county; that they had neither a poll-tax list nor a property-tax list while making the selection; that he assumed that there were quite a number of eligible grand jurors among the negroes of Harris County, "But I don't know how many have paid their poll-tax. I made no investigation to determine the number of negroes who had paid their poll-tax. I did not make any effort to determine whether any negro possessed the qualifications according to the statute. I don't know if the other commissioners did; if they did, I don't know" (R. 23-24).

T. L. Culpepper, the other commissioner, testified:

> "I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race" (R. 36).

C. F. Richardson, a negro newspaper publisher in Harris County since 1916, testified that there were approximately 8,000 colored poll-tax payers in that county, that a majority

of those are of sound mind and good moral character, that approximately 6,000 of them were male persons who were qualified grand jurors. We quote from his testimony (R. 30).

> "I have never served on a grand jury, or been on the grand jury panel. I can almost count or name the negroes who have served on the grand jury in the last ten years. They are R. L. Anders, deceased; Sam Wilson, deceased; Louis Watson, deceased; Homer McCoy, deceased; C. W. Rice; Newman Dulley, I. M. Terrel, deceased, and the last one to serve, in 1936, was A. W. Taylor, special police officer. Two of them served more than once; one was Louis Watson. Sam Wilson served three or four times. They both ran white barber shops; the others served only once. Alex Taylor was a special officer at the time he served on the grand jury.
>
> "I found on looking over our newspaper files that there were no negro grand jurors in Harris County during 1938. We keep a record of them in our newspaper files. There was one negro on the venire of sixteen during 1937, but he was not selected. Alex Taylor served as a grand juror in 1936. As far as my memory serves me he was the only negro to serve on the grand jury that year. In the newspaper business we consider it good news when a negro is placed on the grand jury, and so we keep a close check. We usually put such an event on the front page with a streamer heading. I don't recall if any negroes served on the grand jury in 1935. I don't recall about 1934. I could check our records for those two years and find out."

R. R. Grobe was another witness who testified at the hearing of the motion. He said he was in the barber business and chairman of the Educational Committee of the Third Ward Civic Club. Among other things he testified (R. 26-27):

> "From my knowledge of the colored population I know many negroes in this county who are of sound

mind and good moral character, who are able to read and write; who have not been convicted of a felony, and who are not under indictment or other legal accusation for theft, and who have paid their poll-tax and are qualified to vote. My best estimate is there are about 8,000 such negroes in Harris County in 1938. We have about 400 teachers in our school system who are negroes; about fifty per cent of them are male. There are upward of several thousand negroes in this county who have had a high school education. There is a college for negroes here; they have ten or twelve male teachers. We have a goodly number possessed with the qualifications for grand jurors.

"I have lived in Houston twenty-two years. I don't know the number of negroes who have served on grand juries in Harris County during that period; I know occasionally we have a negro on the grand jury. I do not know how many served during 1938. The other negroes generally know about it when a negro serves on the grand jury. Our observation is that one or two negroes have served on grand juries, for instance, Watson and Jim Wilson in his life time seemed to alternate on grand juries. They were not the only two, but they served pretty regularly when negroes were selected. They were sort of standing grand jurors, according to my observation. I know one other negro that served. Both Watson and Jim Wilson were barbers; they were both good citizens; they shaved white people exclusively. Wilson died a few years back and so did Watson. Since they died I recall two negroes who have served on the grand jury in this county, C. W. Rice and a man named Terrell. Terrell is now dead; Rice is a newspaper man here. Outside of those I don't know of any other negroes who have served."

J. E. Robinson (R. 31-32) testified that he knew the qualifications of grand jurors, that he was acquainted with the negro population in Harris County and that seventy-five per cent of the colored male population met the requirements; that he was Vice-Supreme Commander of the American

Woodmen Fraternal Life Insurance Company, and his work brought him in contact with many negroes who are educated and law-abiding citizens and that he had never served on the grand jury though he had lived in Houston for a period of thirteen years. Further testifying he said:

> "I know three or four negroes who have served on grand juries in the past ten years. I know Homer McCoy was one; he's deceased. I know of Sam Wilson, I. M. Terrell, both deceased, and C. W. Rice, now living. I don't recall the others who served now. I don't know of any that served in 1938. I would know if any had served."

L. L. Lockhart testified that he was a negro man, had lived in Houston for thirty years, was a retired U. S. mail carrier, had worked for the U. S. government for twenty-eight years in Houston, delivering mail to white people, and was Grand Deputy Marshall of the Colored Masons of Texas. Further testifying he said:

> "I have never served on a grand jury. I do not know of any negro serving on the grand jury of Harris County in 1938, or in 1936. I think I have heard of some serving in the last ten years. I think that Sam Wilson served on a grand jury within the last ten years.
>
> "I know that most of the negroes in this county can read and write; there are very few illiterate negroes in this county. As far as I know they are all law-abiding citizens of sound mind, and have not been convicted of a felony. Being a mail carrier I could have served, or could have been excused."

The testimony of R. J. Lindley, the clerk of the Criminal District Court, shows that John Kerr was the only negro on the grand jury panel for 1938, but was not taken because he was too far down on the list; that Pierre Marks, another negro, was on the list for the November term of 1937, but that he did not serve for the same reason.

Alex Taylor was on the list for the February term of 1936 and was the only negro who served on the grand jury during that entire year.

W. B. Watson was on the list for the November term of 1935 but he did not serve because he was number 16 on the list.

For the August term of 1935, C. W. Rice, a negro, was on the list. He did not serve but the reason is not shown.

L. G. Luper was on the grand jury panel for the May term of 1935. He was number 16 on the list and of course he was not selected.

T. M. Fairchild, a negro, was likewise sixteenth on the list for the February term of 1935 and did not serve for the same reason.

James D. Ryan was number 16 on the list for the August term of 1934. He did not serve.

Harry Mack was number 16 on the list for the May term of 1933 and did not serve.

Bernice Booth was number 16 on the list for the August term of 1931 and did not serve.

Judge Langston G. King, who heard the motion to quash the indictment, called as a witness by the State, testified:

> "There has only been one negro on a grand jury panel at one time. I don't know why the negro on the grand jury panel has been number sixteen; it hasn't been that way all the time, but *practically all of the time*. I don't know why, with the one or two exceptions, the negro has always been below the twelfth man. (R. 39) In the other instances the negro would usually be number sixteen on the list and as I understand it the statute says that the first twelve qualified will be selected as the grand jury; in fact, often the last two or three white men on the list are not reached as grand jurors" (R. 40).

In conclusion Mr. Lindley testified that he had never seen a negro grand jury commissioner since the date when the

court was first created on January 1, 1928. Judge King's testimony on this point (R. 39) went further back, stating "I don't know of any negro being a grand jury commissioner as far back as 1925."

Summary of the Evidence.

Summarized, the evidence shows:

That no Negro served upon the grand jury which indicted the defendant, nor was any Negro drawn as a member of the grand jury panel of sixteen from which the grand jurors were selected by the court; that no Negro served on any grand jury during the entire year of 1938; that more than twenty per cent of the population of Harris County, Texas, at all times material to this inquiry, were Negroes; that of eighty-five thousand poll taxes of both men and women paid, eight thousand were Negroes and of which eight thousand Negroes some four thousand to six thousand of them were men possessing the qualifications of grand jurors as enumerated in the statute; that only the better class of the Negro population of said county are sufficiently interested to pay their poll taxes and those who pay their poll taxes at all represent the better type and law-abiding Negro population; that of those Negroes who were shown to have paid their poll taxes many of them are high school graduates and elementary, high school and college teachers, also members of various professions, and all possessing the qualifications of grand jurors; that only one Negro for the entire year of 1938 was merely placed upon the grand jury panel of sixty-four names during the said year, and he did not actually serve because "There were twelve qualified grand jurors on the list before him, and his name was not reached" (testimony of District Clerk). That during the past ten years the record shows the names of only eighteen Negroes were drawn by the grand jury commissioners out of a total list of six hundred and forty constituting the total grand jury panel for such period; that the last Negro to serve on a grand jury of Harris

County was Alex Taylor, a member of the grand jury for the February term, 1936; that another Negro, Lewis Watson, served as a member of the May term, 1934; that a Negro, Homer E. McCoy, served on the May term, 1932; W. P. Cartwright served in November, 1931; that of the three grand jury commissioners appointed by the court to select the grand jury no Negro has ever been appointed within the memory of the clerk of the court nor of the Trial Judge, both of whom testified at the said hearing; that of the total of four hundred and eighty grand jurors who actually served during the past ten years only five were Negroes; that never more than one Negro was ever drawn by the grand jury commissioners and this has occurred not more than twice in any year for the past ten years except the year 1935, and that almost invariably the Negro's name appears No. 16 upon the list; and that as a general rule the court in selecting the grand jury from the grand jury panel calls the first twelve on the list.

Authorities.

Carter v. *Texas,* 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed. 839;

Collins v. *State,* 60 S. W. 42;

Guinn v. *United States,* 238 U. S. 347, 35 S. Ct. 926, 59 L. Ed. 1340, L. R. A. 1916 A, 1124;

Johnson v. *State,* 124 S. W. (2d) 1001;

Juarez v. *State,* 277 S. W. 1091;

Lane v. *Wilson,* 307 U. S. 268, 59 S. Ct. 872;

Martin v. *Texas,* 200 U. S. 316, 319, 26 S. Ct. 338, 50 L. Ed. 497;

Montgomery v. *State,* 55 Fla. 97, 455 So. 879;

Norris v. *Alabama,* 297 U. S. 587, 55 S. Ct. 579;

Pierre v. *Louisiana,* 306 U. S. 354, 59 S. Ct. 536, 83 L. Ed. 540;

Smith v. *State,* 77 S. W. 453;

Whitney v. *State,* 59 S. W. 895;

Constitution of the United States, Fourteenth Amendment, 28 U. S. C. A., Sec. 344 (b);
Sec. 237 Judicial Code, amended;
Rule 38, par. 5 (a), Rules of Supreme Court;
Sec. 19, Article 1, Constitution of Texas (Bill of Rights);
Sec. 5, Article 5 Constitution of Texas;
Articles 338, and 339, Code of Criminal Procedure of Texas;
Art. 819 Code of Criminal Procedure of Texas.

ARGUMENT.

The constitutional principle applicable herein has been well stated in *Carter* v. *Texas*, 177 U. S. 442, 20 S. Ct. 687, 44 L. Ed., and in *Martin* v. *Texas*, 200 U. S. 316, 319, 26 S. Ct. 338, 50 L. Ed. 497:

> "What an accused is entitled to demand, under the constitution of the United States is that, in organizing the Grand Jury as well as in the impaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

The decisive question in this case is: Does the evidence adduced upon the hearing of the motion to quash the indictment show as a matter of law the prohibited discrimination and exclusion?

It is respectfully submitted that such evidence clearly establishes discrimination against the negro race in the appointment of the grand jury commissioners by the District court and the selection of the grand juries by the commissioners for many years prior to and during the year 1938. The fact that a few jurors, not more than five (according to the testimony of R. J. Lindley, the district clerk, R. 33-34, 37-38) actually served during a period of nearly ten years, while other negroes were merely

placed on the list and invariably were not selected because they were too far down on the list shows, as was said by Judge Henderson in *Smith* v. *State*, 77 S. W. 453, "an attempt to avoid the effect of the decisions of the Supreme Court of the United States instead of an effort to comply with the Fourteenth Amendment and the decisions thereunder."

The quoted testimony of the grand jury commissioners Card G. Elliot and T. L. Culpepper shows an utter disregard of the existence of the large number of negroes in Harris County qualified to serve on grand juries, and in itself shows the unlawful discrimination complained of as stated by Judge Henderson in *Smith* v. *State*, 77 S. W. 453:

> "An effort to comply with the Fourteenth Amendment and the decisions thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson county, might have entitled the negro race to a greater representation on both the grand and petit juries than is here shown."

Petitioner does not contend that the facts of the cited cases are "on all fours" with the facts of the instant case. But the difference is merely one of form, not of substance. In those cases, the discrimination, unlawful and prohibited, was at least open, honest and above-board. Negroes were excluded because those charged with the administration of the law honestly believed members of that race inferior and unfit to serve either as grand or petit jurors. In the case at bar, however, the discrimination is covered with a thin veneer of compliance with the law but which even upon a superficial examination appears inescapably as a scheme to evade the law. As was said in *Norris* v. *Alabama, supra:*

> "When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but

> also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.

It is true that both Elliot and Culpepper, the two commissioners who testified in answer to questions of the District Attorney, stated that they "did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that grand jury." But may their mere *declarations* overcome their *acts* of discrimination?

This question has been answered by Chief Justice Hughes in *Norris* v. *Alabama*, 294 U. S. 598, 55 S. Ct. 579, as follows:

> "And the commissioner testified that in the selections for the jury roll no one was 'automatically or systematically' excluded, or excluded on account of race or color; that he 'did not inquire as to color', that was not discussed.
>
> But, in appraising the action of the commissioner, these statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact negroes in the county qualified for jury service. That testimony was direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside."

Precisely what took place in the instant case. Here, too, Commissioner Elliot testified "I made no investigation to determine the number of negroes who had paid their poll

tax. I did not make any effort to determine whether any negro possessed the qualifications according to the statute." And Commissioner Culpepper testified: "I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race." However, both further testified that they assumed there were quite a number of eligible grand jurors among the negroes of Harris County.

In its original opinion, the Court of Criminal Appeals of Texas upbraids the attorneys for petitioner with the statement:

> "This is rather a serious charge against the officers charged with the administration of the law. They are not only presumed to fairly and impartially administer the same, but under their oath are bound to do so; and in the absence of clear and convincing proof to the contrary, the presumption obtains that they did so."

We respectfully submit that a complete answer to the quoted statement is found in the testimony of the clerk of the District Court, already quoted. For what presumption obtains in the face of a record of evasion established by the regularity with which it has occurred? Is it necessary to show *complete exclusion* in order to prove denial of *equal* protection of the laws? Is it equal protection when, in *nearly ten years,* one per cent of the grand juries are composed of negroes, while more than twenty per cent of the population is of that race? Is it more than a mere gesture at compliance *when never at any time has more than one negro been even placed on the grand jury panel and even then, almost invariably, he is placed with deadly accuracy as number sixteen,* considering that the judge himself testified that *it was his understanding of the law that the grand jury should be composed of the first twelve?*

In the cited cases from Alabama, Florida, Louisiana and Oklahoma, the administrative officers had the candor to defy

the United States Constitution by utterly ignoring or intentionally disregarding the negro race, while in the case at bar they have cleverly contrived to conceal their design of circumventing the Constitution. But have they not just as effectively denied the spirit of the Fourteenth Amendment? As said by Judge Henderson in *Smith* v. *State,* 77 S. W. 453, at page 454:

> "While we fully understand the sentiment that may have actuated the officers of the court below, and appreciate their disinclination to place the administration of the law, even in part, in the hands of a people assumed to be inferior to the white race, yet under the law and before the law all are equals, and in its administration no favors can be shown, nor can either the letter or spirit of the law be ignored."

The findings of fact of the Court of Criminal Appeals of Texas are not binding upon the Supreme Court of the United States.

Strauder v. *West Virginia,* 100 U. S. 303, 308, 309, 35 L. Ed. 664;

Norris v. *Alabama,* 294 U. S. 597, 55 S. Ct. 579, 580, 79 L. Ed. 1074.

Virginia v. *Rives,* 100 U. S. 313, 319, 25 L. Ed. 667.

The eloquent words of Justice Black, speaking for the Supreme Court of the United States in *Pierre* v. *State of Louisiana,* 59 S. Ct. 536, 306 U. S. 354, come to mind. He there said:

> "Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests. Indictment by grand jury and trial by jury cease to harmonize with

> our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service. The Fourteenth Amendment intrusts those who because of race are denied equal protection of the laws in a State first 'to the revisory power of the higher courts of State, and ultimately to the review of this court.' "

The practice of the administrative officers of the Criminal District Court of Harris County, Texas, as disclosed by this record, clearly shows a sophisticated evasion of the law rather than an honest attempt to comply with the law. Such attempt at evasion has been outlawed by this Court in *Lane* v. *Wilson, supra.*

Speaking through Justice Frankfurter, the Court said:

> "We, therefore, cannot avoid passing on the merits of plaintiff's constitutional claims. The reach of the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions."
>
> *Quinn* v. *United States,* 238 U. S. 347, 35 S. Ct. 926, 59 L. Ed. 3140, L. R. A. 1916A, 1124;
>
> *Myers* v. *Anderson,* 238 U. S. 368, 35 S. Ct. 932, 59 L. Ed. 1349.

The Amendment nullifies sophisticated as well as simple minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. When in Guinn *v.* United States, supra, the Oklahoma "grandfather clause" was found violative of the Fifteenth Amendment, Oklahoma was confronted with the serious task of devising a new registration system consonant with her own political ideas but also consistent with the Federal Constitution. We are compelled to conclude, however reluctantly, that the legis-

> lation of 1916 partakes too much of the infirmity of the "grandfather clause" to be able to survive." (Italics added.)

Throughout every age and in every country, minorities—racial, religious, social or political—have been oppressed or ignored by devious methods, ofttimes ingenious and sometimes ridiculous.

The edicts of Caligula were placed too high to be read; the lone negro on the Harris County grand jury panel too low to be reached. It is against such unjust practices that the Fourteenth Amendment stands.

It is respectfully submitted that the very strange character of this case as shown by the record, coupled with the claim that your petitioner has been denied the equal protection of the laws, makes this a case of grave public concern, calling for the exercise by this Honorable Court of its supervisory powers to the end that rights guaranteed under the Constitution of the United States shall be preserved.

Wm A. Vinson,
Esperson Bldg., Houston, Tex.,
Harry W. Freeman,
Sam W. Davis,
Attorneys for Petitioner.

EXHIBIT A.

IN THE COURT OF CRIMINAL APPEALS OF TEXAS—AT AUSTIN.

Appeal from Harris County.

No. 20,768.

EDGAR SMITH, Appellant,

vs.

THE STATE OF TEXAS, Appellee.

Appellant's Motion for Rehearing.

Comes now Edgar Smith, appellant in the above entitled and numbered cause, and, within the time provided by law, files this his Motion for Rehearing and respectfully moves this Court to set aside its judgment of affirmance rendered herein on January 24, 1940, for the following reasons, to-wit:

I

The Court erred in affirming the judgment of the trial court, overruling appellant's motion to quash the indictment as reflected in his Bill of Exceptions No. 1, for the reason that the undisputed evidence adduced upon the hearing of said motion, and particularly the evidence of the clerk of the trial court, conclusively establishes as a matter of law the unlawful discrimination complained of.

II

The Court erred in overruling appellant's challenge to the sufficiency of the evidence for the reason that the undisputed evidence shows that appellant was found by the son-in-law of prosecutrix asleep or lying down on the front porch of the house where the offense is alleged to have taken place, and that such evidence raises a reasonable doubt as

a matter of law, to the benefit of which the defendant is entitled.

Argument.

I

In his motion to quash the indictment, appellant contended that the Grand Jury Commissioners of Harris County, Texas, had for a period of many years arbitrarily and systematically excluded negroes from serving on the Grand Jury, or that the number of negroes selected by the Grand Jury Commissioners for service on the Grand Jury for many years prior to the indictment of appellant had been so negligible as in itself to show and establish such unlawful discrimination, etc., and that no negro was a member of the Grand Jury which indicted him. The motion contains other essential allegations which it is not deemed necessary to repeat herein. Though the Court in its opinion (bottom of page 1) states that

"*All* of the Grand Jury Commissioners stated there was nc express and intentional disregard for members of the negro race,"

the evidence shows that only two of the commissioners testified. Card G. Elliot, one of the commissioners, stated that they selected the Grand Jurors merely from their personal acquaintance with the people over the country; that they had neither a poll-tax list nor a property-tax list while making the selection; that he assumed that there were quite a number of eligible Grand Jurors among the negroes of Harris County, "but I don't know how many have paid their poll-tax. I made no investigation to determine the number of negroes who had paid their poll-tax. I did not make any effort to determine whether any negro possessed the qualifications according to the statute. I don't know if the other commissioners did; if they did, I don't know."

The other commissioner, T. L. Culpeper, testified

"I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race."

This utter disregard of the existence of the large number of negroes in Harris County qualified to serve on grand juries, in itself shows unlawful discrimination, as stated by Judge Henderson in *Smith* v. *State,* 77 S. W. 453,

"An effort to comply with the fourteenth amendment and the decisions thereunder, instead of endeavoring to avoid the same, in a colored population shown to exist in Grayson county, might have entitled the negro race to a greater representation on both the grand and petit juries than is here shown."

But that is not all. The undisputed evidence adduced upon the hearing of the motion to quash the indictment shows:

That no Negro served upon the Grand Jury which indicted the defendant, nor was any Negro drawn as a member of the Grand Jury panel of sixteen from which the Grand Jurors were selected by the court; that no Negro served on any Grand Jury during the entire year of 1938; that more than twenty per cent of the population of Harris County, Texas, at all times material to this inquiry, were Negroes; that of eighty-five thousand poll taxes of both men and women paid, eight thousand were Negroes and of which eight thousand Negroes some four thousand to six thousand of them were men possessing the qualifications of Grand Jurors as enumerated in the statute; that only the better class of the Negro population of said county are sufficiently interested to pay their poll taxes and those who pay their poll taxes at all represent the better type and law-abiding Negro population; that of those Negroes who were shown to have paid their poll taxes many of them are high school graduates and elementary, high school and college teachers, also members of various professions, and all possessing the qualifications of Grand Jurors; that only one Negro for the entire year of 1938 was merely placed upon the Grand Jury panel of sixty-four names during the said year, and he did not actually serve because "There were twelve qualified grand jurors on the list before him, and his name was not reached." (testimony of District Clerk) That during the past ten years the record shows the names of only eighteen Negroes were drawn by the Grand Jury

Commissioners out of a total list of six hundred and forty constituting the total Grand Jury panel for such period; that the last Negro to serve on a Grand Jury of Harris County was Alex Taylor, a member of the Grand Jury for the February term, 1936; that another Negro, Lewis Watson, served as a member of the May term, 1934; that a Negro, Homer E. McCoy, served on the May term, 1932; W. P. Cartwright served in November, 1931; that of the three Grand Jury Commissioners appointed by the court to select the Grand Jury no Negro has ever been appointed within the memory of the clerk of the court nor of the Trial Judge, both of whom testified at the said hearing; that of the total of four hundred and eighty Grand Jurors who actually served during the past ten years only five were Negroes; that never more than one Negro was ever drawn by the Grand Jury Commissioners and this has occurred not more than twice in any year for the past ten years except the year 1935, and that almost invariably the Negro's name appears No. 16 upon the list, and that as a general rule the court in selecting the Grand Jury from the Grand Jury panel calls the first twelve on the list.

It is true that both Elliot and Culpepper, the two commissioners who testified, in answer to questions of the District Attorney, stated that they "did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that grand jury" But may their mere *declarations* overcome their *acts* of discrimination?

This question has been answered in the negative by Chief Justice Hughes in *Norris* v. *Alabama,* 294 U. S. 587, 55 Sup. Ct. 579, as follows:

"And the commissioner testified that in the selections for the jury roll no one was 'automatically or systematically' excluded, or excluded on account of race or color; that he 'did not inquire as to color' that was not discussed.

But, in appraising the action of the commissioners, these statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact negroes in the county qualified for jury service. That testimony was direct and spe-

cific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of others remained. The fact that the testimony as to these persons fully identified, was not challenged by evidence appropriately direct, cannot be brushed aside."

We respectfully call the court's attention particularly to the testimony of R. J. Lindley, the clerk of the Criminal District Court, which reveals the practice for some ten years prior to the time when the indictment against appellant was returned.

That John Kerr was the only negro on the grand jury panel for 1938, but was not taken because he was too far down on the list; that Pierre Marks, another negro, was on the list for the November term of 1937, but that he did not serve for the same reason.

Alex Taylor was on the list for the February term of 1936 and was the only negro who served on the grand jury during the entire year.

W. B. Watson was on the list for the November term of 1935 but he did not serve but the reason is not shown.

L. G. Luper was on the grand jury panel for the May term of 1935. He was number 16 on the list and of course he was not selected.

T. M. Fairchild, a negro, was likewise sixteenth on the list for the February term of 1935 and did not serve for the same reason.

James D. Ryan was number 16 on the list for the August term of 1934. He did not serve.

Harry Mack was number 16 on the list for the May term of 1933 and did not serve.

Bernice Booth was number 16 on the list for the August term of 1931 and did not serve.

In conclusion Mr. Lindley testified that he had never seen a negro Grand Jury Commissioner since the date when the court was first created on January 1, 1928. Judge King's testimony on this point went further back, stating 'I don't know of any negro being a Grand Jury Commissioner as far back as 1925.

Lindley's testimony is a complete answer to the statement in the Court's opinion that

"We would not be justified in ferreting out such scheme when the evidence was sharply conflicting as to the existence of discrimination at all."

And his testimony is also a complete answer to the further statement of the Court that

"This is rather a serious charge against the officers charged with the administration of the law. They are not only presumed to fairly and impartially administer the same, but under their oath are bound to do so; and in the absence of clear and convincing proof to the contrary, the presumption obtains that they did so."

For what presumption obtains in the face of a record of evasion established by the regularity with which it has occurred? Is it necessary to show *complete exclusion* in order to prove denial of *equal* protection of the laws? Is it equal protection when, *in ten years,* one per cent of the grand juries are composed of negroes, while more than twenty per cent of the population is of that race? Is it more than a mere gesture at compliance *when never at anytime has more than one negro been even placed on the grand jury panel and even then, almost invariably, he is placed with deadly accuracy as number sixteen,* considering that the judge himself testified that *it was his understanding of the law that the grand jury should be composed of the first twelve?*

In the cases we have cited in our original brief, from Alabama, Florida, Louisiana and Oklahoma, the administrative officers had the candor to defy the United States Constitution by utterly ignoring or intentionally disregarding the negro race, while in the case at bar they have cleverly contrived to conceal their design of circumventing the Constitution. But have they not just as effectively denied the spirit of the Fourteenth Amendment? As said by Judge Henderson, speaking for this court in Smith *v.* State, 77 S. W. 453, at page 454:

"While we fully understand the sentiment that may have actuated the officers of the court below, and appreciate their

disinclination to place the administration of the law, even in part, in the hands of a people assumed to be inferior to the white race, yet under the law and before the law all are equals, and in its administration no favors can be shown, nor can either the letter or spirit of the law be ignored."

He had first known the negro race when yet in slavery. He had lost an arm at Sharpsburg fighting for the Confederacy. He had suffered and had survived the ravages of Reconstruction. Yet when it came to apply the fundamental law of the land to the facts of the case, this great judge, speaking for this Court, with the concurrence of Judge Davidson, another great judge whose experiences were not unlike his own, remembered that he had taken an oath which did not prevent him from *ferreting out* schemes to evade the law because of a mere presumption that the administrative officers had done their duty fairly and impartially. The eloquent words of Justice Black, speaking for the Supreme Court of the United States in Pierre *v.* State of Louisiana, 59 Sup. Ct. Rep. 536, 306 U. S. 354, come to mind. He there said:

"Yet, when a claim is properly asserted—as in this case—that a citizen whose life is at stake has been denied the equal protection of his country's laws on account of his race, it becomes our solemn duty to make independent inquiry and determination of the disputed facts—for equal protection to all is the basic principle upon which justice under law rests. Indictment by Grand Jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service. The Fourteenth Amendment intrusts those who because of race are denied equal protection of the laws in a State first 'to the revisory power of the higher courts of State, and ultimately to the review of this court.' "

Nor may sophisticated evasion of the law shown by the record in this case be disregarded. See Lane *v.* Wilson, 59 Sup. Ct. Rep. 872, 307 U. S. 268.

II.

Finally, we can not forbear from expressing surprise that in our attack upon the sufficiency of the evidence, the most salient feature, the most outstanding circumstance of innocence which, standing alone, sets this case apart from the general proposition that upon an issue of fact the jury's verdict is decisive,—that is, the failure of the negro defendant to flee but on the contrary his remaining on the premises at the scene of the alleged crime and actually going to sleep, was not even mentioned in the court's opinion. Surely, for the benefit of the jurisprudence of this State, it ought to be announced that such fact comports with human experience and what staggered credulity in the days of our forebears, has become a commonplace in this credulous age.

Let the judges and the lawyers and the people of Texas be told that the undisputed facts, appellant's going to sleep on the front porch of the house where he is alleged to have committed rape upon a white woman by force and his being found there by the son-in-law of prosecutrix, do not, in the opinion of this Court, create that reasonable doubt as a matter of law to the benefit of which appellant was entitled, in accordance with the superior and paramount rule of evidence pronounced in 18 Tex. Jur., page 430, and fully quoted in our original brief (page 18).

Wherefore, appellant prays that this his Motion for Rehearing be granted, that the judgment of the trial court overruling his motion to quash the indictment be reversed, that such indictment be quashed and the prosecution dismissed. He further prays, in the alternative only, that because of the insufficiency of the evidence upon the issue of guilt the judgment of the trial court be reversed and this cause remanded for a new trial.

Respectfully submitted,

(Signed) SAM W. DAVIS,
HARRY W. FREEMAN,
Attorneys for Appellant.

EXHIBIT B.

From the Code of Criminal Procedure of Texas.

Article 338. Shall Select Grand Jurors.

The jury commissioners shall select sixteen men from the citizens of the different portions of the county to be summoned as grand jurors for the next term of the court.

Article 339. Qualifications.

No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

2. He must be a freeholder within the State, or a householder within the county.

3. He must be of sound mind and good moral character.

4. He must be able to read and write.

5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony.

EXHIBIT C.

Section 5 of Article 5, Constitution of the State of Texas:

The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law.

EXHIBIT D.

Article 819, Code of Criminal Procedure of Texas. Receipt of Mandate.

When the clerk of any court from whose judgment an appeal has been taken in felony cases wherein bail has been allowed shall receive the mandate of the Court of Criminal Appeals affirming such judgment, he shall immediately file the same and forthwith issue a capias for the arrest of the defendant for the execution of the sentence of the court, which shall recite the fact of conviction, setting forth the offense and the judgment and sentence of the court, the appeal from and affirmance of such judgment and the filing of such mandate, and shall command the sheriff to arrest and take into his custody the defendant and place him in jail and therein keep him until delivered to the proper penitentiary authorities, as directed by said sentence. The sheriff shall forthwith execute such capias as directed.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

NO. 33

EDGAR SMITH,
Petitioner

v.

THE STATE OF TEXAS
Respondent

BRIEF FOR THE STATE OF TEXAS

APPEALED FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

BRIEF FOR RESPONDENT

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GENERAL INDEX

AUTHORITIES

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BRIEF FOR THE STATE OF TEXAS

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PRELIMINARY STATEMENT

Petitioner, Edgar Smith, a negro, was tried under an indictment for the offense of rape upon a white woman. He was convicted and given a life sentence in the penitentiary. He appealed to the Court of Criminal Appeals in Texas, which is the court of last resort in said State, and it affirmed the judgment of the trial court.

The petitioner filed in the trial court a motion to quash the indictment because there was no negro on the grand jury in Harris County, Texas, who indicted him for said offense. The trial court after hearing the evidence overruled the motion and its action was upheld by the Court of Criminal Appeals in Texas.

The sole question presented in this court, as we understand, is whether said motion was properly overruled. No other Federal question being involved.

We have not been furnished a copy of petitioner's brief and cannot therefore answer same specifically.

The State of Texas presents the following propositions.

FIRST PROPOSITION

The State of Texas having answered the motion to quash and the trial court having heard the evidence and the testimony having shown that no discrimination was made in the selection of the grand jury, this court should affirm the judgment of the Court of Criminal Appeals of Texas.

SECOND PROPOSITION

There being an abundance of testimony in the record to support the trial court's findings that no discrimination was made by the jury commission in

selecting the grand jury in question, this court should affirm the judgment of the Court of Criminal Appeals of Texas.

THIRD PROPOSITION

The question raised by petitioner being only to the sufficiency of the testimony to show a discrimination against the negro race in the selection of the grand jury in question and the evidence having been fully developed, and it appearing therefrom that the evidence would and does support the findings of the trial court as well as the Court of Criminal Appeals of Texas, this court should affirm the judgment of the Court of Criminal Appeals of Texas.

STATEMENT OF THE EVIDENCE

On the motion to quash the trial court heard the evidence which is given in the record (21-40). The jury commission which selected the grand jury in question was composed of T. L. Culpepper, George W. Strake, Card C. Elliot. (R. 21)

Mr. Elliot testified that no negroes were drawn on the grand jury; (R. 21) that he did not know how many but there were a large number of negroes in Harris County. He testified "In selecting the Grand Jury I tried to select Grand Jurors who were representative of all the classes of the county. I had that in mind. . . .

"We selected the Grand Jurors from our personal acquaintance with the people over the county. . . .

"I did not select any negro as a member of the Grand Jury panel. I don't know many negroes in the county other than those who have worked for us. (R. 23)

"There was some mention of having a negro or negroes on the Grand Jury panel, but I don't recall exactly what it was. . . . I know there were no negroes among the men that I suggested. I don't know if the other two commissioners suggested any negroes or not; I know there was some discussion about it, but I can't say positively just how extensive that discussion was. I know the names were being suggested by the three of us, but there were names of people mentioned that I didn't know. We were engaged in selecting the Grand Jury panel for several hours; I think it took up the best of a half day period. I do not remember the name of any particular negro possessing the qualifications of a grand juror.

"It is my impression from reading the papers over the past years, . . . that there was usually at least one negro on the Grand Jury; . . . I do recall negroes being on the Grand Jury and reading about it. . . .

"We had no list before us when we selected the grand jury. . . . We just sat down and selected sixteen good men who we figured were qualified without any regard to anything other than their quali-

fications. It was my thought to pick a representative Grand Jury, fair to all classes. I didn't suggest any negro because I didn't happen to know any negro. I don't know at this time of a single negro in Harris County, possessing the qualifications of a Grand Juror. (R. 24) . . . .

"The question of negroes was mentioned, and it is my impression that the other gentlemen, I don't know which one, maybe both of them, mentioned the possibility of selecting a negro that would qualify. The only discussion was this; that the question of race was not to be considered; a man was not disqualified because he was a negro. . . .

"I did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that Grand Jury." (R. 25)

R. R. Grobe testified "I know many negroes in this county who possess the qualifications required by statute, that is, who are of sound mind and good moral character who are able to read and write; who have not been convicted of a felony, and who are not under indictment or legal accusation for theft, and who have paid their poll tax and are qualified to vote. My best estimate there were about eight thousand such negroes in Harris County in 1938. . . .

"I don't know the number of negroes who have served on grand juries in Harris County during the

past twenty-two years; I know occasionally we have a negro on the grand jury. (R. 26) . . .

"Our observation is that one or two negroes have served on grand juries, for instance, Watson and Wilson. . . . They were not the only two, but they served regularly when negroes were selected. . . . I know one other negro that served. Both Watson and Jim Wilson were barbers; they were both good citizens. . . . Wilson died a few years back and so did Watson. Since they died I recall two negroes who have served on the grand jury in this county. C. W. Rice and a man named Terrell. Terrell is now dead, Rice is a newspaper man here . . . .

"There are eight thousand negro poll tax payers in Harris County according to my best judgment. I don't know how many of that eight thousand are women; I have no idea. I would say about three thousand out of the eight thousand poll tax payers are men, as we have more negro women who pay poll taxes than men." (R. 27)

Carl Smith testified that in 1937 there were about one hundred eight thousand poll tax payers including exemptions, that outside of the exemptions there were about eighty-five thousand who paid poll taxes for 1937. (R. 27-8)

C. F. Richardson, who edited the "Houston Defender," a weekly colored newspaper testified that he had sixty-two hundred subscribers mostly negroes. (R. 28). . . .

He further testified that approximately six thousand of the eight thousand colored poll tax payers were male persons. (R. 30)

He testified "I have never served on a grand jury, or been on the grand jury panel. I can almost count or name the negroes who have served on the grand jury in the last ten years. They are R. L. Anders, Sam Wilson, Louis Watson, Homer McCoy, C. W. Rice, Newman Dudley, I. M. Terrell, and A. W. Taylor." (S. F. 30)

W. K. Richardson testified that he was an assistant Criminal District Attorney and had been for seven years that during said time there had been five or six negroes who have served on Grand Juries. (R. 29)

J. E. Robinson testified that seventy-five per cent of the colored male population in Harris County were under the law qualified to serve as grand jurors. "I know three or four negroes who have served on grand juries in the past ten years. (R. 31-2)

L. L. Lockhart testified that he was a retired U. S., colored, mail carrier, having worked in that position for twenty-eight years in Houston. He testified "I have never served on a grand jury. I do not know of any negroes serving on any grand juries in Harris County in 1938, or in 1936. I think I have heard of some serving in the last ten years." (R. 33)

R. J. Lindley testified that he was Clerk of the

Criminal District Court in Harris County and had been since 1928. (R. 33) He testified he had a complete list of the grand jurors for the past ten years. He testified that said list showed that in 1938 John H. Kerr, a negro, was selected on the February Grand Jury; that Pierre Marks, a negro, was on the Grand Jury list for November 1937; that H. E. McCoy, a negro, was on the Grand Jury list for the May Term, 1937; that Will Wood, a negro, was on the Grand Jury list for November Term, 1936; that Alex Taylor, a negro, was on the Grand Jury panel for the February Term, 1936; that Hugh B. Watson, a negro, was on the Grand Jury panel for November, 1935; that C. W. Rice, a negro, was on the Grand Jury panel for August Term, 1935; that L. G. Luper, a negro, was on the Grand Jury panel for the May Term, 1935; that T. M. Fairchild, a negro, was on the Grand Jury panel for February Term, 1935; that James G. Ryan, a negro, was on the Grand Jury panel for the August Term, 1934; that Louis Watson, a negro, was on the Grand Jury list for the May Term, 1934; that Alex Taylor, a negro, was on the Grand Jury panel for the November Term, 1933; that Harry Mack, a negro, was on the Grand Jury panel for the May Term, 1933; that Alex Taylor, a negro, was on the Grand Jury panel for the November Term, 1932; that Homer E. McCoy, a negro, was on the Grand Jury panel for the May Term, 1932; that W. P. Cartwright, a negro, was on the Grand Jury panel for February Term. 1932; that John Kerr, a negro, was on the Grand Jury panel for the November Term, 1931; that Ber-

nice Booth, a negro, was on the Grand Jury panel for August Term, 1931." (R. 34)

L. T. Culpepper testified that he was on the jury commission which drew the grand jury in question that he was in the real estate business and had lived in Harris County nineteen years. (R. 35) He testified: "In selecting the men for grand jury service we had a list, and we tried to select men who had not previously served on the grand jury, as best we could. I felt it was our duty to be fair to all classes in the county, and to make the grand jury as representative of all classes as possible, as to race and other matters.

"I did not suggest the name of any negro to be placed on the list, because I wasn't personally acquainted with any member of the negro race. We selected men from various parts of the county. . .

"I had never met Mr. Elliot or Mr. Strake, the other two commissioners, before that time. . . .

"I thought it was customary to have one negro on the grand jury. The reason I didn't suggest any is because none came to my mind. I couldn't recall any down in my territory. . . .

"The question of placing a negro on the list came up; one of the other gentlemen brought it up, but I don't remember which one it was; they tried to think up one that possibly would be okay for grand

jury service. As I remember, the names of some few negroes were discussed. I don't recall their names. One of the other two gentlemen brought up their names as well as I remember we didn't select any negro.

"The reason I didn't suggest any negro from the City of Houston is because I wasn't familiar with any and I didn't know of any that I figured were qualified in my section of the county. (R. 36)

"The other two grand jury commissioners and I did not intentionally, arbitrarily and systematically discriminate against any negro on the grand jury panel because of his race or color; that is, I did not and nothing was said by the other two to that effect." (R. 36-37)

Judge King testified that he was the Judge of the Criminal District Court No. 2 who empanelled the Grand Jury in question and that he had been such judge for ten years. That in selecting the three grand jury commissioners he tried to get them from different sections of the county and tried to get outstanding citizens and that when he appointed and swore them "I instruct them to select sixteen men, qualified grand jurors, following the statutory qualifications, and tell them what they are, and that there must be no discrimination against any race, color, religion, or anything else. I have reminded them particularly of the negro population each time though I could not instruct them who to put on the

grand jury, and that the negro race must not be discriminated against.

"Several times since I have been here negroes have served on the Grand Jury. I don't know how many races of people there are in this county but I imagine there are as many or more than sixteen; There are Greeks, Italians, Mexicans, Czechs, Germans, Negroes and others. (R. 39). . . .

"I have always instructed the grand jury commissioners to select men without reference to creed or color, and to get a fair representation of all classes, as far as possible, with sixteen men. (R. 39). . .

"I have never failed to place a negro on the grand jury because of his color; that is, I have never excused one for that reason." (R. 40)

ARGUMENT AND AUTHORITIES

The question to be determined in this case is one of fact. In his motion to quash, petitioner alleged: "That the Grand Jury Commissioners of Harris County, Texas, had intentionally, arbitrarily and systematically for a period of many years last past excluded all persons of African descent from serving on the Grand Jury or in any event the number of negroes selected by the Grand Jury Commission for service on the Grand Juries had been so negligible as in itself to show and establish such unlawful discrimination, and that no negro was selected by

the Grand Jury Commission to serve on the Grand Jury for the August Term, 1938, at which time he was indicted" (R. 6-7).

Article 5, Section 13, of the Constitution of Texas, provides that a Grand Jury shall be composed of twelve men but that nine members thereof shall be a quorum to transact business and present bills of indictment.

Article 16, Section 19, of the Texas Constitution, provides that the Legislature shall prescribe by law the qualifications of Grand Jurors.

Article 333 of the Code of Criminal Procedure of Texas, provides that the District Judge shall appoint three jury commissioners.

Article 335 of the Code of Criminal Procedure provides that said grand jury commissioners shall appear before the Judge and take an oath that they will not knowingly select a grand juror who they believe to be unfit or not qualified.

Article 336 of the Code of Criminal Procedure provides that at the time the jury commissioners are sworn in by the Judge he shall instruct them as to their duties.

Article 338 of the Code of Criminal Procedure in Texas provides that the jury commissioners shall select sixteen men from different portions of the coun-

ty to be summonsed as Grand Jurors for the next term of court.

Article 339 of the Code of Criminal Procedure provides that a Grand Juror must be a citizen of Texas and qualified to vote; must be a free holder or a householder; must be of sound mind and good moral character; must be able to read and write; must not have been convicted of any felony; must not be under any indictment for theft or any felony.

Article 340 of the Code of Criminal Procedure of Texas requires that the list of names selected to serve as Grand Jurors be sealed in an envelope.

Article 344 of the Code of Criminal Procedure requires the District Clerk to open said envelope thirty days before court meets and make a copy of the Grand Jury and deliver it to the Sheriff.

It is therefore apparent that every precaution possible has been taken to prevent any discrimination against any class or classes of people in serving on grand juries because of their race or religious creed.

The record in this case shows that there are approximately one hundred and eight thousand poll tax payers in Harris County of which approximately eight thousand are negroes and from this list the grand jury commissioners can only draw sixteen names for grand jury service.

The records show that there are at least sixteen different nationalities in the City of Houston. The court can perhaps take judicial notice that every religious creed and faith would be and is represented by the voters in Harris County, Texas. It is therefore impossible to have every race and every creed represented on each Grand Jury that is empanelled.

It is, we think, appropriate to call the court's attention to the fact that under the law in Texas the Grand Jury consists of twelve men to be selected by the Court from the sixteen drawn by the Jury Commission. The trial judge cannot control in any way who the Jury Commissioners select. He must however, take the grand jury from the list drawn, if they are present and in court, and are under the law qualified. The trial court has no way of compelling a Grand Jury Commission to select any particular class of people, it is his duty to instruct the grand jury commission as to their duties and responsibilities.

In the case at bar no contention is made about the three jury commissioners being outstanding good citizens in Harris County. They were properly and legally selected by the court. Judge King who selected the Jury Commission testified that he tried to select three good men and that when he swore them in he instructed them as to their duties and responsibilities and that he told them "that there must be no discrimination against any race, color, religion or anything else." (R. 38) It therefore appears that there is nothing that the trial court could

have possibly done that was not done in the organization and selection of the Jury Commission which drew the Grand Jury which in turn indicted petitioner, Edgar Smith.

The two Grand Jury Commissioners who were called to testify, Mr. Elliot and Mr. Culpepper, each testified in effect that in selecting the Grand Jury they tried to select Grand Jurors who were representative of all the classes of the county. And that they did not intentionally, arbitrarily and systematically discriminate against a negro being selected on that Grand Jury. And that the reason no negro was selected was because they did not know the name of any negro who was qualified.

Mr. Lindley, the District Clerk, produced the list of Grand Jurors for ten years which showed that eighteen times negroes had been selected on the Grand Jury panel and in several instances had served on the Grand Jury and in some instances had been excused from service because of their, the negroes', request to be excused. (R. 33 & 37)

There were approximately one hundred and eight thousand qualified voters in Harris County. (R. 28) Of these approximately eight thousand were negroes. (R. 27) It, therefore, appears that about one out of every fourteen qualified voters in Harris County were negroes. Under the Constitution and laws of the State of Texas the Grand Jury consists of only twelve men who must be qualified voters.

In the case at bar the District Judge in empanelling the Grand Jury Commission of three men selected out of the one hundred and eight thousand qualified voters in Harris County instructed them that they should not in the selection of the Grand Jury discriminate against any race, color, religion or anything else and especially that they should not discriminate against the negro population. (R. 38) The record as a whole belies the statement or suggestion that during the past ten years the Grand Jury Commissioners had systematically kept negroes off the Grand Jury panel to the contrary the record shows that each year there has been drawn one or more negroes on the Grand Jury panel.

Counsel is familiar with the case of *Martin* v. *The State of Texas*, 200 U. S. 316, which lays down the doctrine that "whenever by any action of a state whether through Legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color, from serving as Grand Jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States."

The above principle has been recently followed by this court in *Pierre* v. *State of Louisiana*, 306 U. S. 354, and in *Hale* v. *Kentucky*, 303 U. S. 614.

The Court of Criminal Appeals in Texas has been

equally zealous to guard the rights of the negroes and Mexicans from unjust discrimination.

In *Juarez* v. *State of Texas*, 277 S. W. 1091, the Court of Criminal Appeals in Texas reversed the judgment because of the alleged unjust discrimination against the defendant because he was a Catholic holding the trial court should have heard the evidence and if the alleged discrimination was found to be true the indictment should be quashed.

In *Johnson* v. *State of Texas*, 124 S. W. (2d) 1001, the Texas Court of Criminal Appeals reversed the judgment because the records showed that there had been a discrimination against the negro race in the selection of the grand jury which indicted the defendant.

While this court in the case of *Martin* v. *State of Texas*, 200 U. S. 316, laid down the general rule quoted above, it affirmed the judgment of the Court of Criminal Apeals, because the defendant failed to prove the negro race had been discriminated against in the selection of the grand jury and held that it was incumbent upon the defendant not only to allege the discrimination but to prove same. This court said:

> " 'No evidence was offered in support of the motion by the accused to quash the indictment, unless the facts set out in the written motion to quash, verified to the best of his knowledge and belief, can be regarded as evidence in support of the motion. We are of the opinion that it

could not properly be so regarded. . . . The facts stated in the written motion to quash although that motion was verified by the affidavit of the accused, could not be used in evidence to establish those facts, except with the consent of the State Prosecutor or by order of the trial court. No such consent was given. No such order was made. The grounds assigned for quashing the indictment should have been sustained by distinct evidence introduced or offered to be introduced by the accused. He could not, of right, insist that the facts stated in the motion to quash should be taken as true. . . . The motion to quash was, therefore, unsupported by any competent evidence; consequently it cannot be held to have been erroneously denied.' " . . .

"A different conclusion in this case would mean that, in a criminal prosecution of a negro for crime, an allegation of discrimination against the African race because of their race could be established by simply proving that no one of that race was on the grand jury that returned the indictment, or on the petit jury that tried the accused; whereas, a mixed jury, some of which shall be of the same race with the accused cannot be demanded as a right, in any case; nor is a jury of that character guaranteed by the Fourteenth Amendment. What an accused is entitled to demand, under the Constitution of the United States is that in organizing the grand jury as well as in the empanelling the petit jury, there shall be no exclusion of the race, and no discrimination against them, because of their race or color."

In *Ramirez* v. *The State of Texas*, 40 S. W. (2d) 138, in which this court refused a writ 284 U. S. 659,

the Court of Criminal Appeals of Texas held that the evidence was not sufficient to show a discrimination against the Mexican race in selection of Grand Jurors although the records showed one-tenth of the population in the county was Mexican and yet no Mexican had ever been selected on a petit jury or grand jury in said county. To the same effect is the opinion of the Court of Criminal Appeals in Texas in *Lugo* v. *State*, 124 S. W. (2d) 344.

In the case at bar the Court of Criminal Appeals in Texas, after stating that the motion to quash the indictment had been filed and overruled, used this language:

> "This motion was contested by the State and the court heard evidence thereon. We do not deem it necessary to set out the evidence at length, but it is our opinion that the same wholly fails to show an intentional and arbitrary refusal to select negroes for the grand jury service on the panel that returned the indictment against the appellant. All of the grand jury commissioners stated there was no expressed and intentional disregard for members of the negro race." (R. 44)

On motion for rehearing the Court of Criminal Appeals in Texas relative to the motion to quash used this language:

> "Looking to the testimony heard upon the motion to quash the indictment, it is observed that we were in error in our statement in the original opinion that all the jury commissioners testified

that there was no intentional exclusion of members of the negro race from the grand jury. Only two of the commissioners testified upon the hearing. Mr. Elliot, one of the Commissioners, testified that he did not recall whether any negroes were drawn by the commission. He said that the names of some negroes were mentioned during the time the selection was being made. Further, he testified that he did not suggest a negro because he did not know the name of any negro at the time living in Harris County who possessed the qualifications of a grand juror. On his cross examination he said: 'I did not intentionally, arbitrarily and systematically discriminate against any negro being selected on that jury.' Mr. Davis (Culpepper), the other member of the jury commission who testified upon the hearing, said that in selecting the Grand Jury he felt that it was the duty of the commission 'to be fair to all classes in the county.' Further, he testified that he suggested the name of no negro because he was not personally acquainted with any member of the negro race. Upon cross examination he said 'the other two grand jury commissioners and I did not intentionally, arbitrarily and systematically discriminate against putting a negro on the grand jury, because of his race or color; that is, I did not and nothing was said by the other two to that effect.' It appears from the agreement entered into between the District Attorney and counsel for appellant that in 1930 there were seventy-two thousand six hundred and two negroes in Harris County, including men, women and children. Furthermore, it appears that in 1937 there were between seven and eight thousand negroes who paid their poll taxes. Again, it was shown that a large number of negroes possessed the qualifi-

cations of grand jurors. W. K. Richardson, a witness for the State, testified that four grand juries were selected each year. He said: 'During the seven years I have been associated with the grand jury I would say that five or six negroes have served on some grand juries; that is just a guess. I think one of those negroes served two different times, not in succession.' He testified that there was no negro on the grand jury that indicted appellant. At this juncture we quote his testimony as follows: 'I have been present on practically all occasions when Judge King and Judge Boyd have charged the grand jury commissioners on the selection of grand jurors. They have been instructed to select citizens from all parts of the county and of all different races or walks of life. The court instructed the grand jury commissioners on the law governing the selection of grand jurors. I do not recall seeing any negro grand jury commissioner. They have all been white that I have seen.'

"C. F. Richardson, a witness for appellant, testified that there was approximately six thousand negro men who paid poll taxes in Harris County during the year 1938. He could not say how many of these men possessed the qualifications of a grand juror. We quote from his testimony as follows: 'I can almost count the names of the negroes who have served on the grand jury in the last ten years.' The witness then named approximately seven negroes.

"Several negro men testified that they had never served on a grand jury. Their testimony was to the further effect that they possessed the qualifications of grand jurors. There was testimony to the effect that there were very few

illiterate negroes in the county. There was also testimony to the effect that about eighteen negroes had been drawn by the jury commissioners for grand jury service since 1931. The Clerk of the Criminal District Court No. 2 of Harris County testified that on several occasions that the negro on the panel was number sixteen. However, his testimony was to the effect that negroes had been serving on the grand juries.

"The trial judge testified that he made it a rule in instructing jury commissioners that there should be no discrimination against any race, color, or religion. He said 'I have reminded them particularly of the negro population each time, though I could not instruct them who to put on the grand jury, and that the negro race must not be discriminated against. Several times since I have been here negroes have served on the grand jury. I don't know how many different races of people there are in this county.' " (R. 47-8)

The Court of Criminal Appeals, after reviewing the testimony on motion for rehearing and quoting therefrom at length as above set forth, held that as a matter of fact the record did not and does not show any discrimination was or has been practiced against the negro race in Harris County in the selection of the grand juries.

Unquestionably we submit the evidence is sufficient to sustain the finding of fact made by the trial court as well as by the Court of Criminal Appeals in Texas that there was no discrimination. This case

is distinguishable from the case of *Hale* v. *Kentucky*, supra, and *Pierre* v. *Louisiana*, supra, and the authorities cited in those opinions, as well as *Johnson* v. *State of Texas*, 124, S. W. (2d) 1001, and *Juarez* v. *State of Texas*, 277 S. W. 1091, because the record in each of said cases revealed the fact that the negro race had been discriminated against.

In the case at bar we submit the evidence shows without controversy that no discrimination against the negro race existed in Harris County. The officers in said county were and are attempting to enforce the law impartially against all races and are trying to obey the law as construed by this court as well as by the Court of Criminal Appeals in Texas. The trial court persistently instructs the jury commissioners not to discriminate against the negro race. This is as far as he could possibly go in the matter. The jury commissioners have drawn in the last ten years as many negroes for service on the grand jury as they have white men in proportion to the population of Harris County. The two jury commissioners called in the case at bar testified positively that they had not intentionally discriminated against the negro race. If this court holds under the facts in this case that there was a discrimination as a matter of law against the negro race, then the State of Texas submits that there is no way for it to at any time combat the contention of a negro defendant that he had not been discriminated against unless it was shown that a number of negroes had been in fact not only summonsed but had been made to serve upon a grand jury. This

we submit is not the law. As was so aptly said by this court in *Martin* v. *State of Texas*, 200 U. S. 316.

> "A mixed jury, some of which shall be of the same race with the accused, cannot be demanded, as of right, in any case; nor is a jury of that character guaranteed by the Fourteenth Amendment."

WHEREFORE, the State of Texas prays that the judgment of the Court of Criminal Appeals in Texas be in all things affirmed.

Copies of this brief have been furnished counsel for petitioner.

Respectfully submitted

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SMITH *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 33. Argued November 14, 1940.—Decided November 25, 1940.

1. The conviction of a Negro upon an indictment returned by the grand jury of a county in which, at the time of such return and long prior thereto, Negroes were intentionally and systematically excluded from grand jury service, solely on account of their race and color, denies to him the equal protection of the laws, in violation of the Fourteenth Amendment of the Federal Constitution. P. 132.
2. Upon review of a state court decision wherein a claim of a right under the Federal Constitution was denied, this Court will examine and appraise for itself the evidence relating to such right. P. 130.
3. The evidence in this case sustains the claim of racial discrimination in the selection of the grand jury by which the Negro defendant was indicted; and, whether such discrimination was accomplished ingeniously or ingenuously, his conviction was void. Pp. 130–132.

136 S. W. 2d 842, reversed.

CERTIORARI, 309 U. S. 651, to review the affirmance of a judgment sentencing the petitioner upon his conviction of a crime. The trial court had overruled a motion to quash the indictment.

Mr. Sam W. Davis, with whom *Messrs. William A. Vinson* and *Harry W. Freeman* were on the brief, for petitioner.

Mr. George W. Barcus, Assistant Attorney General of Texas, with whom *Messrs. Gerald C. Mann,* Attorney General, and *Lloyd Davidson,* State Criminal Attorney, were on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

In Harris County, Texas, where petitioner, a negro, was indicted and convicted of rape, negroes constitute

over 20% of the population, and almost 10% of the poll-tax payers; a minimum of from three to six thousand of them measure up to the qualifications prescribed by Texas statutes for grand jury service. The court clerk, called as a state witness and testifying from court records covering the years 1931 through 1938, showed that only 5 of the 384 grand jurors who served during that period were negroes; that of 512 persons summoned for grand jury duty, only 18 were negroes; that of these 18, the names of 13 appeared as the last name on the 16 man jury list, the custom being to select the 12 man grand jury in the order that the names appeared on the list; that of the 5 negroes summoned for grand jury service who were not given the number 16, 4 were given numbers between 13 and 16, and 1 was number 6; that the result of this numbering was that of the 18 negroes summoned, only 5 ever served, whereas 379 of the 494 white men summoned actually served; that of 32 grand juries empanelled, only 5 had negro members, while 27 had none; that of these 5, the same individual served 3 times, so that only 3 individual negroes served at all; that there had been no negroes on any of the grand juries in 1938, the year petitioner was indicted; that there had been none on any of the grand juries in 1937; that the service of negroes by years had been: 1931, 1; 1932, 2; 1933, 1; 1934, 1; 1935, none; 1936, 1; 1937, none; 1938, none.

It is petitioner's contention that his conviction was based on an indictment obtained in violation of the provision of the Fourteenth Amendment that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." And the contention that equal protection was denied him rests on a charge that negroes were, in 1938 and long prior thereto, intentionally and systematically excluded from grand jury service solely on account of their race and color. That a conviction based upon an indictment returned by a jury so

selected is a denial of equal protection is well settled,[1] and is not challenged by the state. But both the trial court and the Texas Criminal Court of Appeals were of opinion that the evidence failed to support the charge of racial discrimination. For that reason the Appellate Court approved the trial court's action in denying petitioner's timely motion to quash the indictment.[2] But the question decided rested upon a charge of denial of equal protection, a basic right protected by the Federal Constitution. And it is therefore our responsibility to appraise the evidence as it relates to this constitutional right.[3]

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it [4] but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not merely promised.

Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial dis-

[1] *Pierre* v. *Louisiana*, 306 U. S. 354; *Martin* v. *Texas*, 200 U. S. 316, 319; *Carter* v. *Texas*, 177 U. S. 442, 447.

[2] 136 S. W. 2d 842.

[3] *Chambers* v. *Florida*, 309 U. S. 227, 228; *Pierre* v. *Louisiana*, 306 U. S. 354, 358; *Norris* v. *Alabama*, 294 U. S. 587, 590.

[4] "No citizen possessing all other qualifications . . . shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; . . ." 18 Stat. 336, 8 U. S. C. § 44.

crimination whatsoever.[5] But by reason of the wide discretion permissible in the various steps of the plan, it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 15, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list.

The state argues that the testimony of the commissioners themselves shows that there was no arbitrary or systematic exclusion. And it is true that two of the three commissioners who drew the September, 1938, panel testified to that effect. Both of them admitted that they did not select any negroes, although the subject was discussed, but both categorically denied that they intentionally, arbitrarily or systematically discriminated against negro jurors as such. One said that their failure

[5] The statutory scheme is set out in the Texas Code of Criminal Procedure, Articles 333–350. At each term of court, three grand jury commissioners are appointed; at the time they are sworn in, the judge instructs them as to their duties; they are required to take an oath not knowingly to select a grand juror whom they believe unfit or unqualified; they must then retire to a room in the court house, taking the county assessment roll with them; while in that room they must select a grand jury of 16 men from different parts of the county; they must next seal in an envelope the list of the 16 names selected; thirty days before court meets the clerk is required to make a copy of the list and deliver it to the sheriff; thereupon the sheriff must summon the jurors.

to select negroes was because they did not know the names of any who were qualified and the other said that he was not personally acquainted with any member of the negro race. This is, at best, the testimony of two individuals who participated in drawing 1 out of the 32 jury panels discussed in the record. But even if their testimony were given the greatest possible effect, and their situation considered typical of that of the 94 commissioners who did not testify, we would still feel compelled to reverse the decision below. What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no negroes as well as from commissioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand.

Reversed.

* For the opinion in this case, see 311 US 128.